Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1998

ROBERT L. SCHULZ, GARY T. LOUGHREY, MARK N. AXINN, BRADFORD R. ARTER, and JAMES B. STRAWHORN,

Petitioners,

THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY AND JOSEPH BRUNO, SENATE MAJORITY LEADER; and THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR, H. CARL MC CALL, COMPTROLLER,

Respondents,

And

THE CITY OF NEW YORK; and THE NEW YORK CITY TRANSITIONAL FINANCE AUTHORITY,

Intervenors-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the adoption of New York State Finance Law Section 123-b(1) and its enforcement by the New York State courts in this case has abridged plaintiffs' fundamental rights, liberties and freedoms (right of "separation of powers," right of "petition", right of "republicanism", right to have State judges bound by the United States Constitution) in violation of the "privileges or immunities" provision of the Fourteenth Amendment to the United States Constitution.

2. Whether the adoption of Chapter 16 of the New York Laws of 1997, otherwise known as the New York City Transitional Finance Authority Act ("TFA") and its enforcement by the New York Courts is repugnant to the will of the people of New York State as clearly expressed in the New York Constitution and is therefore violative of plaintiff-citizens' rights under the United States Constitution at Articles IV Section 4, Article VI and the 14th Amendment, Clause 2.

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT L. SCHULZ, GARY T. LOUGHREY, MARK N. AXINN, BRADFORD R. ARTER, and JAMES B. STRAWHORN,

Petitioners,

- against -

THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY AND JOSEPH BRUNO, SENATE MAJORITY LEADER; and THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR, H. CARL MC CALL, COMPTROLLER,

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OPINIONS BELOW

The Order of the New York State Court of Appeals denying the motion for permission to appeal is reported at __ NY2d __ entered December 22, 1998. Copy at Appendix A.

The Order of the New York State Court of Appeals dismissing the appeal as of right is reported at __ NY2d __ entered September 22, 1998. Copy at Appendix B.

The Decision and Order of the New York State Supreme Court, Appellate Division, Third Department is reported at __ AD2d __, entered July 30, 1998. Copy at Appendix C.

The Decision and Order of the New York State Supreme Court, Albany County, is unreported, entered November 25, 1997. Copy at Appendix D.

JURISDICTION

The Order of the New York Court of Appeals denying the motion for permission to appeal was entered on December 22, 1998.

In accordance with Rule 13.4 of this Court, this Petition is filed within 90 days of the date of the Order of the New York Court of Appeals.

The jurisdiction of this Court is invoked under 28 USC Section 1257.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

1. Article VI of the Constitution of the United States provides in relevant part: ***"The Judges in every state shall be bound by this Constitution."***
2. The First Amendment to the United States Constitution reads, in relevant part: ***"Congress shall make no law...abridging...the right of the people...to petition the Government for a redress of grievances."***
3. The Fourteenth Amendment (Clause 2) to the United States Constitution provides, in relevant part: ***"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...."***
4. An implicit constitutional (structural) safeguard is ***"separated powers"*** among the legislative, executive and judicial branches.
5. Article IV, Section 4 of the United States Constitution reads in relevant part: ***"The United States shall guarantee to every citizen in this Union a republican form of government."***

NEW YORK CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6. New York State Finance Law Section 123-b(1) reads: ***"notwithstanding any inconsistent provision of law, any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the***

activity herein referred to, may maintain an action for equitable or declaratory relief, or both against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property, except that the provisions of this subdivision shall not apply to the authorization, sale, execution, or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation." (Petitioners' emphasis)

8. Article I, Section 9.1 of the New York Constitution provides in relevant part: ***"No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government or any department thereof...."***

9. Article VII, Section 7 of the New York Constitution reads: ***"No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management; except in pursuance of an appropriation by law...."***

10. Article VII, Section 8 of the New York Constitution reads: ***"...nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking...."***

11. Article VII, Section 11 of the New York Constitution reads:
"no debt shall be hereinafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election...."

12. Article VIII, Section 1 of the New York Constitution reads:
"...nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking...."

13. Article VIII, Section 2 of the New York Constitution reads:

"No indebtedness shall be contracted by any county, city, town, village or school district unless such county, city, town, village or school district shall have pledged its faith and credit for the payment of the principal thereof and the interest thereon...Provision shall be made annually by appropriation by every county, city, town, village and school district for the payment of interest on all indebtedness and for the amounts required for (a) the amortization and redemption of term bonds, sinking fund bonds and serial bonds...."

14. Article VIII, Section 4 of the New York Constitution reads:

"...no county, city, town, village or school district described in this section shall be allowed to contract indebtedness for any purpose or in any manner which, including existing indebtedness, shall exceed an amount equal to the following percentages of the average full valuation of taxable real estate of such county, city, town, village or school district...c) the City of New York, for city purposes, ten per centum...."

15. Article VIII, Section 12 of the New York Constitution reads:

"It shall be the duty of the legislature, subject to the provisions of this constitution, to restrict the power of taxation, assessment, borrowing money, contracting indebtedness, and loaning the credit of counties, cities, towns and villages, so as to prevent abuses in taxation and assessments and in contracting of indebtedness by them...."

16. Article X, Section 5 of the New York Constitution reads:

"Neither the state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by such a public corporation heretofore or hereafter created, nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision thereof...."

17. Chapter 16 of the New York Laws of 1997, entitled the New York City Transitional Finance Authority Act ("TFA")

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

It is a fact. In 1777, in order to secure their natural and unalienable rights the people of New York placed explicit language in their new Constitution. For instance, the will of the people, as expressed in Article I, Section 9.1 is that no law be passed which would prevent the people from petitioning any department of the government for a redress of grievances. And, the will of the people as expressed in Article I, Section 14 of the New York Constitution is that the Legislature is prohibited from passing any law that would be "repugnant" to any provision of the New York Constitution.

It is a fact. In 1789 the people of New York agreed to join the union of states. In agreeing to do so they distributed a bit more of their sovereign power to a federal government. In return, however, they gained the right to petition the federal government, if necessary, for protection from their "willfully wayward state," should their state act in violation of the fundamental, natural or civil rights of the people.

It is a fact. Between 1846 and 1938, due to the hard lessons of history in New York State, the people of the state added explicit language to the New York Constitution to restrict and prohibit the amount of debt the state and its municipalities could incur and the manner in which public debt could be incurred. For instance, the will of the people, as expressed in Article VIII Section 4(c) of the New York Constitution is that public debt incurred by or on behalf of the City of New York be limited to 10% of the average full valuation of taxable real estate of the City. And, the will of the people as expressed in Article VIII Section 1 of the New York Constitution is that the City of New York is prohibited from giving or lending its credit to a public corporation such as the New York City Transitional Finance Authority ("TFA"). And, the will of the people as expressed in Article VIII Section 2 of the New York Constitution is that no debt be incurred by or on behalf of the City of New York unless the City shall have pledged its full faith and credit for the payment of the principal and interest of that debt. And, it is the will of the people as expressed in Article VII Section 7 that no money shall ever be paid out of the State Treasury or any of the

funds under the management of the State Comptroller to service any debt incurred by the City of New York or by the TFA on behalf of the City of New York except by an appropriation by law. And, it is the will of the people as expressed in Article VII Section 8 of the New York Constitution that the credit of the State shall not be given or loaned to the TFA. And, it is the will of the people, as expressed in Article VII, Section 11 of the New York Constitution that the people vote their approval at a general election before the State incurs a long-term obligation to service any debt incurred by the City of New York or the TFA. And, it is the will of the people as expressed in Article X, Section 5 of the New York Constitution that neither the State nor the City of New York shall use public funds for the payment of any debt obligations issued by the TFA.

It is a fact. In 1975 the New York State Legislature and Executive made a law -- State Finance Law Section 123-b(1) -- which, in its plain language and effect, is designed to suspend all the debt limiting provisions of the N.Y. Constitution by denying the citizens of the State their fundamental right to petition the New York courts to nullify any other law if that other law involves public borrowing (such as Chapter 16 of the New York Laws of 1997—the TFA Act), even if that other law is repugnant to one or more of the debt-limiting provisions of the New York Constitution, including any of those provisions listed in the preceding paragraph. State Finance Law 123-b(1) specifies that citizens shall not be allowed to maintain a lawsuit if the subject matter deals with public debt -- i.e., the "***authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof*** [such as the City of New York], ***or by any public corporation or public benefit corporation*** [such as the TFA]."

It is a fact. In 1979, in apparent violation of the "Separate Powers" doctrine, the New York Court of Appeals issued its decision in Wein v. Comptroller, 46 NY2d 394, ruling that SFL 123-b(1) "does indicate a reasonably clear ***legislative*** intent to prevent taxpayer challenges with respect to a State bond issue or notes issued in anticipation thereof [SFL 123-b(1)]. Under the circumstances it would be inappropriate for the courts to confer standing in these cases since such a determination would, in effect, render the statutory 'exception' a nullity and ignore the

expressed ***legislative*** policy to the contrary," and that to allow citizens to challenge legislative acts that authorize the incurrence of public debt would "increase the cost of raising revenue ***by creating uncertainty in the minds of potential investors.***" (Plaintiffs' emphasis). *Note: The constitutionality of SFL 123-b(1) under the First Amendment and the "separate powers" doctrine was neither raised, presented nor determined in Wein.*

It is a fact. Since 1979, the New York Judicial branch has been enforcing the constitutionally infirmed SFL 123-b(1) by dismissing claims by ***citizens*** that involve public borrowing. By doing so it has been cooperating with the Executive and Legislative branches, allowing the N.Y. Constitution, in effect, to be changed by the Legislative and Executive branches: first, by SFL 123-b(1), and then by various legislative acts (such as Chapter 16 of the New York Laws of 1997) which authorize public borrowing and which are obnoxious to the N.Y. Constitution but which are shielded from citizen suits and judicial review by the impenetrable, door-closing barrier represented by SFL 123-b(1).

It is a fact. In 1994, New York's elected officials chose to ask the people of the State to approve a constitutional amendment to allow the State to create public corporations (such as the New York City Transitional Finance Authority), to have the public corporations borrow money on behalf of "distressed cities" and to use tax revenues to pay the principle of and interest on the bonds of the public corporations.

It is a fact. In 1995 the Legislature gave the required second passage to, and placed before the voters of the state, a proposed constitutional amendment which would have allowed the state to:

- "enter into financing or other similar arrangements with a public benefit corporation for the purpose of providing financing assistance to distressed municipalities," and

- "intercept moneys otherwise payable to a municipality...to make payments of principal, interest, or related payments on indebtedness contracted by...a public corporation authorized to assist such municipality....," and
- "provide moneys to a municipality...which such municipality...may use or, if permitted by law, pledge for the

payment of principal, interest, or related payments on its indebtedness."

It is a fact. On election day, 1995, approximately 1.2 million voters voted "no" to the proposed constitutional amendment while approximately 600,000 voters voted "yes".

It is a fact. In 1997, our elected officials had the effrontery to do what the voters of this state specifically said they didn't want them to do. Our elected officials have adopted a law -- the TFA Act -- that creates a public corporation to incur debt on behalf of a "distressed" City of New York.

It is a fact. In 1997 the New York State Legislature and the Executive made a law -- Chapter 16 of the New York Laws of 1997, entitled New York City Transitional Finance Authority Act -- which, in its language and effect, is repugnant to the provisions of the New York Constitution listed above. The TFA Act created the New York City Transitional Finance Authority ("TFA") and authorized the TFA to issue up to $7.5 billion in long-term bonds and to use the proceeds to compensate various public finance and legal services firms and to operate, repair and maintain existing facilities, projects and programs in the City of New York.

It is a fact. If this isn't enough of an insult to constitutional probity, the law states in its very first paragraph, under "Legislative findings," that the New York Constitution is "outdated", the Legislature knows the Act is repugnant to the constitution, that the City has again reached its constitutional debt limit, that there is a need to override the constitutional prohibitions, that they need to borrow more and that the Constitution has to be ignored until it has been "fixed" by Amendment. The Legislature has said, in effect, "We are in charge now, we are seizing the ultimate power from the people, and the courts will have to go along because we have directed them [by adopting State Finance Law 123-b(1)] to throw out of court any citizen who petitions for a redress of this grievance."

It is a fact. As Appendix E hereto clearly demonstrates, the TFA Act contains no less than ten provisions which individually and severally make the TFA Act repugnant to the provisions of the New York Constitution listed above.

It is a fact. In June of 1997, before any bonds were issued by the TFA, plaintiffs filed this lawsuit in State Supreme Court.

The plaintiffs petitioned the court to declare SFL 123-b(1) unconstitutional, null and void (because it is violative of a citizen's fundamental right to a separation of powers and to their right to petition the government for a redress of grievances), and to declare the TFA Act unconstitutional, null and void ***because it violated the provisions of the NY Constitution and the provisions of the US Constitution listed above.***

It is a fact. On November 25, 1997, the State Supreme Court dismissed the instant case. The Court arbitrarily and capriciously ruled that the constitutionality of SFL 123-b(1) had been upheld in a 1979 decision written by Judge Sol Wachtler. Then the State Supreme Court used SFL 123-b(1) to dismiss the bulk of the constitutional claims. ***Unfortunately, the constitutionality of SFL 123-b(1) was never an issue in the Wachtler decision.*** See Wein v Comptroller 46 NY2d 394 (1979).

It is a fact. The July 30, 1998, decision by the Appellate Division of State Supreme Court was appealed to the New York Court of Appeals in August 1998. At the same time the appellants filed a motion to disqualify four of the seven judges on the Court of Appeals because of conflicts of interest based on spousal employment and ownership of the types of bonds being challenged in the instant case, making the judges lenders to the State.

It is a fact. On September 22, 1998, the Court of Appeals issued a decision. First, the Court dismissed the motion to disqualify four judges on the ground that the Court has no statutory authority to exclude any of its judges from participating in a case. Instead, appellants' application for disqualification was converted by the Court to one for recusal which was then referred to each individual challenged Judge. Each of the challenged Judges then decided not to recuse. Then, acting en banc, the New York Court of Appeals dismissed appellants' appeal as of right, on the ground that "there is no substantial constitutional question directly involved."

It is a fact. In October, 1998, in an effort to exhaust every opportunity for judicial remedy, and under the rules of the New York Court of Appeals, plaintiffs filed a motion with the Court of Appeals for permission to appeal from the July 30, 1998 decision by the Appellate Division of State Supreme Court.

It is a fact. On December 22, 1998, the Court of Appeals denied the motion and, in effect, enforced the constitutionally repugnant State Finance Law 123-b(1) and the constitutionally repugnant TFA Act

It is a fact. In its decisions and orders, in this matter, the New York State courts have cooperated with the Legislature and Executive in a collective decision to deny plaintiffs the fundamental, natural, human and civil rights -- their privileges or immunities -- as guaranteed by the United States Constitution and by the New York State Constitution and as listed in the paragraphs above.

B. STAGES IN THE PROCEEDING WHERE THE FEDERAL QUESTIONS WERE RAISED

In State Supreme Court, Albany County

Plaintiffs presented the Federal Questions in their complaint filed with the State Supreme Court in and for Albany County. The case was assigned to the Hon. Joseph C. Teresi. The following is a listing of all the claims as they were presented to the Court. The Federal Questions were presented in claims 7, 8, 9 and 10:

FIRST CLAIM:
CHAPTER 16 L97 IS VIOLATIVE OF ARTICLE VIII, SECTION 4 OF THE NEW YORK CONSTITUTION

SECOND CLAIM:
CHAPTER 16 L97 IS VIOLATIVE OF ARTICLE VIII, SECTION 2 OF THE NEW YORK CONSTITUTION

THIRD CLAIM:
CHAPTER 16 L97 IS VIOLATIVE OF ARTICLE VIII, SECTION 12 OF THE NEW YORK CONSTITUTION

FOURTH CLAIM:
CHAPTER 16 L97 IS VIOLATIVE OF ARTICLE X, SECTION 5 OF THE NEW YORK CONSTITUTION

FIFTH CLAIM:
CHAPTER 16 L97 IS VIOLATIVE OF ARTICLE VII,
SECTION 11 OF THE NEW YORK CONSTITUTION

SIXTH CLAIM:
CHAPTER 16 L97 IS VIOLATIVE OF ARTICLE VII AND
ARTICLE VIII OF THE NEW YORK CONSTITUTION

SEVENTH CLAIM:
THE EXCEPTION IN STATE FINANCE LAW
SECTION 123-b(1) IS UNCONSTITUTIONAL

EIGHTH CLAIM:
SFL 123-b(1) IS VIOLATIVE OF THE FIRST AMENDMENT TO
THE UNITED STATES CONSTITUTION

NINTH CLAIM:
SFL 123-b(1) IS VIOLATIVE OF SECTION 1,
CLAUSE 2 OF THE FOURTEENTH AMENDMENT
TO THE UNITED STATES CONSTITUTION

TENTH CLAIM:
SFL 123-b(1) IS VIOLATIVE OF ARTICLE IV,
SECTION 4 OF THE UNITED STATES CONSTITUTION

ELEVENTH CLAIM
CHAPTER 16 L97 IS VIOLATIVE OF ARTICLE VII,
SECTION 7 OF THE NEW YORK CONSTITUTION

NOTE: 1) Judge Teresi used SFL 123-b(1) to dismiss claims 1 – 4 and 6 for lack of standing. See Appendix D hereto, page A-15. 2) Judge Teresi did not address claims 7, 8, 9 or 10 on the basis of plaintiffs' constitutional challenge to SFL 123-b(1), i.e., under the 1st Amendment's guarantee of the right to petition or under the privileges or immunities clause of the 14th Amendment or under the guarantee clause of Article IV, Section 4. See Appendix D hereto. 3) The eleventh claim was raised during the proceedings in State Supreme Court, Albany County.

In State Supreme Court, Appellate Division

Plaintiffs presented the Federal Questions in their Brief to the State Supreme Court, Appellate Division. The following is a

listing of the Federal Questions numbers 8 and 9 as presented to the State Supreme Court Appellate Division.

8. Whether Ch. 16L97 violates the US Const. (Art. IV, 1st and 14th Amendments).

9. Whether SFL 123-b(1) violates the US Const. (Art. IV, 1st and 14th Amendments).

In The New York Court of Appeals

Plaintiffs presented the Federal Questions in their arguments to the Court of Appeals in support of their appeal as of right. See Appendix F hereto, which is a copy of plaintiffs' submission to the Court of Appeals. See particularly Questions No. 1, 8 and 9.

Plaintiffs also presented the Federal Questions in their arguments to the Court of Appeals in support of their motion for permission to appeal. The following is a listing of the Federal Questions No. 9, 10 and 18.

9. Is a state's judicially determined purpose of "minimizing uncertainty in the minds of potential investors," sufficiently compelling to justify the enforcement of a state law which abridges the fundamental right of individual citizens of that state to petition the state court for a redress of grievances, even grievances that are deeply rooted in the State Constitution?

10. Whether plaintiffs' fundamental rights under the U.S. Constitution to petition the government for a redress of constitutional grievances (First Amendment), to a guarantee against State laws which abridge fundamental privileges and immunities (Section 1, Clause 2 of the Fourteenth Amendment), to have state judges bound by the provisions of the U.S. Constitution (Article VI, cl 2), and to a government republican in form and substance (Article IV, Section 4) have been violated by the New York State Legislative and Executive when they enacted State Finance Law Section 123-b(1) which, in the case of matters involving the incurrence of public debt, is preventing plaintiffs from petitioning State courts for a redress of State ***constitutional*** grievances, and by the N.Y. State Judiciary in enforcing State Finance Law 123-b(1).

18. Whether Ch. 16L97 violates the US Const. (Art. IV, 1st and 14th Amendments).

REASONS FOR GRANTING THE WRIT

POINT I

THE COURT BELOW VIOLATED A CONTROLLING PRINCIPLE OF LAW ESTABLISHED IN IN RE KEMMLER (1890) 10 S.CT. 930

"The Fourteenth amendment did not radically change the whole theory of the relations of the State and Federal governments to each other, and of both governments to the people." The same person may be at the same time a citizen of the United States and a citizen of a state. Protection of life, liberty and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it." In Re Kemmler at 934, citing United States v Cruikshank 92 U.S. 542 and Slaughterhouse Cases, 16 Wall. 36.

The Court below misapplied this principle of law. The Fourteenth Amendment protects the privileges or immunities of plaintiffs, including the right to petition the government for a redress of grievances and the right to a separation of the powers and the right to a government republican in form and substance, rights transgressed by the Court in its enforcement of SFL 123-b(1).

POINT II

THE COURT BELOW VIOLATED A CONTROLLING PRINCIPLE OF LAW ESTABLISHED IN IN RE DUNCAN, TEX. (1891) 11 S.CT. 573

"By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; ***but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions,*** and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities." In re Duncan, Tex. 1891, 11 S. Ct. 573, 577. (Plaintiffs' emphasis).

The Court below violated this basic principle of law by not comparing SFL 123-b(1) and Chapter 16 of the New York Laws of 1997 with all the provisions of the constitutions of the United States and New York that plaintiffs have alleged the acts have violated.

The legislative and executive need to be reminded that they are limited by written constitutions.

The passage of time produces corruption of principles. It is the duty of good citizens to be ever on the watch against this, and if the gangrene is eventually to prevail, let the day be kept off as long as possible. The primary role of the court, we believe, is to protect the people from the unrestrained acts of the government - -i.e., to keep the Legislature and Executive harnessed to the will of the people ***as expressed in their constitutions***.

Plaintiffs, together with other ordinary, non-aligned citizens, have been degraded from the prime rank, which they ought to hold in human affairs, by a willfully wayward state government that is behaving as if the NY Constitution belongs to it rather than to the people and, therefore, may be suspended at will.

Plaintiffs' cause portrays the three branches of their state government as cooperating in the making and enforcing of laws which abridge plaintiffs' privileges and immunities as both explicitly and implicitly expressed in the United States and New York State Constitutions.

Sovereignty is the right to govern; a nation or state-sovereign is the person or persons in whom that resides. In New York, despite massive misunderstanding, it rests with the people. However, in the practice and even in the science of politics, there has been frequently a strong current in New York against the

natural order of things. In New York, which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it.

The state, rather than the people, for whose sakes the state exists, is frequently the object which attracts and arrests the principal attention. This has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state politics. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial language.

Since the very beginning, the acts of the early national congresses and the acts of the early conventions, including the congress and committees of New York, are replete with expressions with respect to "republicanism" and to the "sovereignty of the people," and the servant nature of governments at all levels. It is to the honor of the United States that in no other country are subjects of this kind better -- or even so well -- understood. One fact stands out: the attention and attachment of the Constitution of the United States and of the New York Constitution to the rights of the sovereign people are discernible, as hard copy, in almost every provision of these documents. It is to be deeply regretted that the constitutional principles which are the cause of action in our lawsuit has not yet received its merited acquiescence and approval as basic principles of governance -- at least, not from New York State's Legislative, Executive and Judicial branches.

The United States and New York have, in their constitutional language, advocated both the form and substance of constitutional republicanism, with its emphasis on individual rights and governmental responsibility for protecting and enhancing them. Operationally, however, these principles are honored more in the breach than in the observance. There still may be reason to hope that the government of New York, in all three of its branches, may yet perceive the wrongness of actions it has taken, such as interdicting the right of the people to petition their government for a redress of grievances, incurring public debt in spite of constitutional restrictions and attempting to exempt the government that represents the body of her citizens from that "suability" which alone enables her citizens to assert their individual, fundamental rights and to seek and obtain the protections of their Federal and State constitutions. It is with this

hope in mind that we petition this Court.

The people have good reason to be thankful for their valuable liberties and privileges. Nothing but forthright insistence upon the perpetuation of constitutional law and government can insure the continuance and enhancement of their liberties and privileges. ***Under the circumstances, in New York, the people cannot do this without actions that would threaten their peace and tranquillity. It becomes necessary for the United States Supreme Court to apply the rule of law.***

POINT III

THE COURT BELOW VIOLATED OTHER CONTROLLING PRINCIPLES OF LAW

When an act of government properly comes before the Court to be compared by it with the fundamental law, it is the duty of the Court to declare the invalidity of the act if it violates any provision of that law. People v Gillson (1888), 109 NY 389.

"The power of the government is not above the Constitution, but it is bounded by its provisions; and if any liberty or franchise is expressly protected by any constitutional provision it cannot be destroyed by any valid exercise by the legislative or executive [power]...the legislature cannot, without reason and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the Constitution of this state; and that if the legislature shall determine what is a proper exercise of its [power] its decision is subject to the scrutiny of the courts." Gillson at 400, 401.

Relying on this principle, it is quite clear that fundamental rights are invaded, weakened, limited or destroyed by the legislative acts under challenge or by the enforcement of those laws by the New York courts.

If these laws and others like it are valid, the fact of their existence is a complete answer to the complaints of the citizen-taxpayers-voters as plaintiffs, ***that their rights, liberties and freedoms are greatly impaired.***

The New York Courts violated this controlling principle of law. In the instant case the New York Courts failed to compare SFL 123-b(1) and Chapter 16 L97 with the fundamental law.

"No inference is warranted that other powers have been conferred by the people upon their legislative body than those which are mentioned in the Constitution, or which are necessary to carry into effect those which are expressly given." Rathbone v Wirth (1896), 150 NY 459, 467.

The rights of the people, which are an accompaniment of our political institutions; which are expressly recognized as such by our Constitution, and the permanency of which is guaranteed therein, have been deliberately trenched upon by the legislative and executive bodies. What becomes of the right of the majority of the people to control the incurrence of public debt and the overburdensome level of taxation that results when a law is enacted which closes the door to judicial review of other laws which authorize the seemingly unconstitutional incurrence of public debt?

It is not to much to say of SFL 123-b(1) and Chapter 16 L97 that they are an attack upon fundamental forms of personal liberty against which the specific constitutional provisions involved herein were intended to act as safeguards. These legislative acts are as opposed to a safe state policy as to the very letter of the Constitution.

It doesn't take much of an argument to show the importance of the debt limiting clauses in our State Constitution, or what their presence means for our political institutions. Their very presence in the Constitution of the State beginning in 1846 evidences the importance which the people attach to the preservation of these rights in the management of their state and local affairs. They mean the right to control the level of public debt or they mean nothing. The theory of the Constitutions is that the people are, of right, entitled to petition the courts to compare acts of the legislature with the fundamental law and to have those laws invalidated if they are repugnant to any provision of the N.Y. Constitution or the Constitution of the United States, and that this right cannot be taken from them and the people, in effect, spat upon by any act of the legislature, or of any or all the departments of the state government combined.

This right of "republicanism" lies at the foundation of our institutions, and cannot be disturbed or interfered with without weakening the entire foundation. The fundamental law is to be "carefully guarded by every department of government, but every infraction or evasion of it to be promptly met and

condemned; especially by the courts, when such acts become the subject of judicial investigation." People ex rel. Bolton v Albertson, 55 NY 50.

The acts under challenge here appear as legislation, hostile to freedoms meant to be protected by the "petition clauses" of the N.Y. and U.S. Constitutions and by Articles VII, VIII and X of the N.Y. Constitution, which plaintiffs have a right to claim, under the Constitution, in the management of the State's fiscal affairs. It cannot be denied that legislation SFL 123-b(1) and Chapter 16 L97 are examples of legislation that have an inimical tendency.

"The judicial power was intended to stand as a bulwark against all legislation which impairs any of the constitutional guarantees. The legislative power of the state is vested in the legislature and it is plenary with respect to the state at large, or to any portion thereof, in matters of government, except as restricted by the Constitution...We must not forget that a Constitution is the measure of the rights delegated by the people to their governmental agents and not of the rights of the people. It apportions the powers of government, with such limitations as are appropriate to keep their exercise clearly defined. The Judicial power can, and should, pronounce null all laws which contravene its provisions...." Rathbone at 470.

No branch of government may avoid the mandate of the Constitution. Matter of Greene, 166 NY 485.

The Court below arbitrarily and capriciously violated this basic principle of law by not comparing SFL 123-b(1) and Chapter 16 of the New York Laws of 1997 with all the provisions of the constitutions of the United States and New York that plaintiffs have alleged the acts have violated.

Citizen-taxpayers have "standing to challenge enactments of our State Legislature as contrary to the mandates of our State Constitution." Boryszewski v Brydges, 37 NY2d 361.

The Court below arbitrarily and capriciously violated this basic principle of law by not comparing SFL 123-b(1) and Chapter 16 of the New York Laws of 1997 with all the provisions of the constitutions of the United States and New York that plaintiffs have alleged the acts have violated.

It is the responsibility of the Court to apply and enforce the will of the people as expressed in the Constitution even if this results in considerable practical difficulty, and any law which

purports to restrict the judicial authority to fashion relief, constitutes a patently unconstitutional infringement on the powers of the Judiciary. Bethlehem Steel Corp. v Bd. Of Ed., 44 NY2d 831.

The Court below violated this controlling principle of law.

Any act of the Legislature, "which purports to restrict the judicial authority to fashion remedies, constitutes a patently unconstitutional infringement on the powers of the judiciary." Bethlehem at 834. SFL 123-b(1), in effect, directs the Judiciary to dismiss any lawsuit which seeks to challenge the power of the State or local governments to borrow money, even if the complaint is deeply rooted in the Constitution. The Court below (while misapprehending the facts related to prior Schulz and Wein cases), enforced SFL 123-b(1), thereby accepting the legislatively imposed restriction on its (the Court's) power to review Chapter 16 L97.

Section 1 of Chapter 16 L97 and respondents' papers in the Court below refer to a fiscal crisis in New York City as the justification for circumventing the Constitution's debt limiting provisions. However, fiscal crises encountered by cities "does not constitute an emergency justifying suspension of constitutional limitations." Bethlehem at 834. Such fiscal crises, grave as they may be, "cannot seriously be equated with the emergencies contemplated in the Constitution: that is, enemy attack or other forms of disaster." Bethlehem at 834. The consequences of legislation such as SFL 123-b(1) and Chapter 16 L97, purportedly designed to address a fiscal crisis in New York "cannot be justified by fugitive recourse to the police power of the State or to any other constitutional power to displace inconvenient but intentionally protective constitutional limitations." Bethlehem at 834, 835 quoting Flushing Nat. Bank v Municipal Assistance Corp. for City of N.Y., 40 NY2d at 736.

POINT IV

THE NEW YORK COURT WAS ARBITRARY AND CAPRICIOUS

While the New York Courts used State Finance Law 123-b(1) to dismiss plaintiffs constitutional challenge to the TFA Act under Article X Section 5, Article VIII Sections 1, 2, 4, 12 and

Article VII Sections 8 of the N.Y. Constitution, the Courts did reach the merits of plaintiffs' constitutional challenge to the TFA Act under Article VII Sections 7 and 11 of the N.Y. Constitution. However, in doing so, the Courts were arbitrary and capricious in their decisions.

POINT V

BASIC RIGHTS HAVE BEEN TAKEN WAY BY THE STATE. ONLY THE U.S. SUPREME COURT CAN RESTORE THOSE RIGHTS.

Plaintiffs' First Amendment right to petition the government for a redress of grievances, involving unconstitutionally incurred public debt, has been taken away by the New York State Legislature and Executive and enforced by the N.Y. Court. ***Only the U.S. Supreme Court can restore that right.*** The Legislature and the Executive enacted the exception language SFL 123-b(1) which declares, in essence, that the courthouse door is closed to citizen-petitioners in cases where they are seeking to obtain compliance with debt-limiting restrictions of the N.Y. Constitution. It is now necessary for the U.S. Supreme Court to declare SFL 123-b(1) to be unconstitutional.

Plaintiffs' fundamental right to a "separation of powers" has been infringed by the Unified Court System of New York. ***Only the U.S. Supreme Court can restore that right.*** The New York State Judiciary has been cooperating with the Legislature and Executive by enforcing SFL 123-b(1). Since 1992, the Judiciary has dismissed seven of plaintiff Schulz' lawsuits for lack of standing under SFL 123-b(1). Those lawsuits were filed against the Legislature and the Executive for enacting laws authorizing the incurrence of public debt in spite of specific New York constitutional restrictions.

Plaintiffs' constitutional right to have their State judges comply with the provisions of the U.S. Constitution has been taken away by the New York State Judiciary. ***Only the U.S. Supreme Court can restore that right.*** Plaintiffs have argued four cases before the N.Y. Court of Appeals where the matter involved a constitutional attack on the incurrence of public debt. In each case the Court of Appeals has failed to address plaintiffs'

First Amendment attack on SFL 123-b(1) only to use SFL 123-b(1) to dismiss plaintiffs' claims for lack of standing.

Plaintiffs' right to a State government republican in form and substance and their guarantee of freedom from the making and enforcement of State laws that abridge their fundamental privileges and immunities have been taken away. ***Only the U.S. Supreme Court can restore those rights.***

POINT VI

THE N.Y. COURT'S ENFORCEMENT OF SFL 123-B(1) IS VIOLATIVE OF THE SEPARATE POWERS DOCTRINE

New York State Finance Law Section 123-b(1) reads:

> ***"notwithstanding any inconsistent provision of law, any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property, except that the provisions of this subdivision shall not apply to the authorization, sale, execution, or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation."*** (Petitioners' emphasis)

Enforcement by the Court of State Finance Law Section 123-b(1) is violative of the "separate powers" doctrine, an inherent, implicit, U.S. constitutional safeguard requiring tall walls and clear distinctions between the powers of the Legislative, Executive and Judicial departments of government.

By making and enforcing SFL 123-b(1), which abridges plaintiffs' natural, human and civil rights to "petition" and to a "separation of powers," the State defendants have violated plaintiffs' natural, human and civil rights under the "privileges or

immunities" clause (14th Amendment) and the guarantee clause (Article IV, Section 4) of the U.S. Constitution.

It has been said that if government is to function constitutionally, it is necessary for each of the repositories of constitutional power to keep within its power. Rescue Army v Municipal Court of Los Angeles, 331 US 459.

The three departments of the State government are all of limited and defined powers, Loan Assoc. v Topeka, 87 US 655 and no department possesses any authority not granted by the State Constitution. Hepburn v Griswold, 75 US 603.

Frequently, (as in the case of the New York Constitution), there appears in a State Constitution an express division of the powers of government among the three departments and, all persons charged with official duties under one of the departments are forbidden from exercising any of the functions of another except as expressly permitted by the Constitution itself. Porter v Investors Syndicate, 287 US 346.

The most fundamental protection afforded by the doctrine of separation of powers lies in the power of the courts to test legislative and executive acts by the light of the constitutional mandate and, in particular, ***to preserve constitutional rights***. Bixby v Pierno, 4 Cal.3d 130.

Under the American system of constitutional government, among the most important functions entrusted to the judiciary is the interpreting of constitutions. Webster v Cooper, 55 US 488.

The Legislature cannot exercise any judicial function or "transfer" any judicial function to the legislative or executive except as may in terms be allowed to it by the Constitution itself. James v Appel, 192 US 129.

POINT VII

THE GUARANTEE CLAUSE IS MEANT TO PROTECT PEOPLE FROM WILLFULLY WAYWARD STATES

Lest anyone argue jurisdiction based upon some holding that early decisions by this court place all questions raised under the Guarantee clause in the realm of political, rather than judicial, considerations, we offer the following:

This case is clearly distinguishable from what some consider to be the dispositive case -- Pacific Telephone and Telegraph Co. v. Oregon, 233 U.S. 118 (1912). In Pacific Telephone the issue was whether an amendment to the Oregon Constitution for direct legislation violated: 1) the provisions of the Act of Congress admitting Oregon to the Union; or 2) Article IV, Section 4 of the U.S. Constitution guaranteeing a republican form of government.

The instant case is distinguishable from Pacific Telephone in at least two ways:

(1) The New York Constitution has never been before the U.S. Congress for review or approval. Unlike Oregon's, it was adopted long before the Union was formed.

(2) Here, unlike Pacific Telephone, plaintiffs are not asking the Court to decide which of two State governments is the legitimate State government. In Pacific Telephone the court was asked to decide if the state government that existed in Oregon by act of Congress, and before its citizens added the citizen initiative and referendum amendment to the State Constitution in 1902, was the legitimate state government; or, if the government that existed under the Oregon Constitution as amended in 1902 was the legitimate government. The Pacific Telephone court made clear its view that if it found that the Oregon State Constitution, as amended in 1902, was violative of Article IV, Section 4's guarantee clause, the validity of every statute passed on Oregon since the adoption of the initiative and referendum amendment to the State Constitution would be affected, and ultimately, the question of whether there was a legislative and judicial branch in Oregon would have to be answered. The court decided the matter was purely political and would have to be decided by Congress. It is interesting to note that the court went to great lengths to show how its decision was so conclusively established by a prior decision of the U.S. Supreme Court "as to cause the matter to be absolutely foreclosed." The court said the controlling case was Luther v. Borden, 7 How. 1, 12 L Ed 581, which the court said grew out of the Dorr Rebellion in Rhode Island. In Luther the court was asked to decide which of two state governments was the legitimate government: the government which grew out of a voluntary constitutional convention or the "Charter government." In Luther the U.S. Supreme Court found that

to select the former would nullify all the laws, taxes, salaries and court judgments -- a disastrous effect. In the instant case the issue is not which of two State governments is the legitimate government but whether the State is acting legitimately -- observing the republican principles upon which the State government was founded. ***The question in the instant case is not a political question***. Plaintiffs are not asking the court to decide which of two state governments is the legitimate government. Plaintiffs are asking the court to rein in the legitimate state government in New York which is "willfully wayward" in that it is violating the basic republican principles of popular sovereignty, government based on the consent of the people, and "separation of powers," provided by both the U.S. and N.Y. Constitutions. In Pacific Telephone, the court ruled that the question before it was "purely political." It said, "Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax but on the state as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which is called to the bar of this court, ***not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.***" Pacific Telephone & Telegraph Co. v. Oregon, 233 U.S. 118, 150 (1912). (Plaintiffs' emphasis). Obviously, the case before the bar is distinguishable from Luther v. Borden, 7 How. 1, 12 L. Ed 581, and its prodigy, including Pacific Telephone & Telegraph Co. v. State of Oregon, 233 U.S. 118 (1912). Here, plaintiffs are calling the government of New York State to the bar for the purpose of testing judicial attitudes regarding the exercise of power, which is being assailed on the ground that its exertion has injuriously affected the rights of citizen plaintiffs because of repugnancy to certain constitutional limitations. Unlike plaintiffs in Luther and Pacific Telephone, plaintiffs here are not in court to demand of the state that it establish its right to exist as a state.

POINT VIII

IN THE INTEREST OF JUSTICE, IT IS THE RIGHT THING TO DO.

Reports are beginning to appear in the national press that the governments of states other than New York are also becoming "innovative and monarchical" in their attempts to circumvent the debt-limiting restrictions of their State Constitutions. The question of "willfully wayward" states can only be addressed effectively by this tribunal. It is timely to do so now.

We know that the conclusions of leading thinkers and analysts on ernment and the "rights of man" -- present and long past -- harmonize with the principles which underlie and defend our argument on the questions now before the Court in this petition for a writ of *certiorari* related to the lawsuit which is the cause of this petition.

The extension of the judicial power of the United States Supreme Court to the controversy of this lawsuit appears to be wise, because, in the thoughts and words of the earliest members of this court, it would be "both honest and useful."

It would be honest because the Court, in its political unassailability, provides for the doing of justice without respect to persons, and for making individual citizens, as well as the States, secure in their respective rights. It would fulfill the promises which a free government makes to every free citizen -- the promise of equal justice and the protection of the laws; the promise of due deference to the sovereignty of the body of the people; and, the promise of due allegiance to the design imperatives -- the need to maintain a separation between and among the powers of governance: legislative, executive and judicial, and the need to acknowledge that government derives its just powers from the consent of the governed ***and are, indeed, limited by written Constitutions.***

It would be useful for several reasons: because it would leave not even the least of its citizens without the means of obtaining justice from the State; because it would obviate the need for occasions of contests and violent quarrels between the citizens and their State due to the arising of claims that the design imperative principle of "a State government republican in form

and substance" (with all that that statement includes and implies) is being or has been abandoned; because it would rest on the great moral truth that justice is the same whether due from one man to a million or from one million to one man; because it would teach and greatly enhance the value of our free republican form of government which places all persons on an equal footing and enables all to obtain justice without regard to the power or number of their opponents; because, based on the great principle that the great body of the people is the true sovereign of their States and of the nation; and, because, consequently, individual citizens are not to be degraded or penalized for appearing with each other in their own courts to have their controversies resolved.

What we intend to argue is, essentially, that citizens, in our constitutional system, have an inalienable right to have a State government that is republican in form ***and substance***, through the structures and processes of which *governance* is provided, but only with the consent of the governed, and that, in New York State, these principles -- the "design imperatives" -- are being violated when: (1) the branches of government -- Legislative, Executive and Judicial -- which are designed to serve the people and to be independent elements in a system of checks and balances, combine to work together in obvious harmony to achieve private or political ends that neither (a) exhibit compliance with the constitutional requirement for their own independence in thought and action, nor (b) result in demonstrable achievement of the public benefit and good; and (2) when citizen grievances (which would seem to indicate a measure of non-consent) are denied access to the judicial decision-making process in key public-debt issues, in obvious violation of the fact that any citizen has the constitutional right to petition the government for a redress of grievances, especially those that are rooted in the State Constitution.

Assuming that the foregoing are "givens," we are petitioning the Supreme Court of the United States of America, to review this matter, which finds itself at the root of the constitutional design-imperatives being violated, as set forth above, and to admit this petition for a writ of *certiorari* based upon the principle set forth in one of the earliest *dicta* of the U.S. Supreme Court that, when an aggrieved citizen of a State, finding himself with no other recourse to achieve the redress of grievances that

are based upon constitutional rights and the need for interpretation thereof, the appropriate court of jurisdiction is the U.S. Supreme Court. See Chrisholm Ex'r v. Georgia, 2 Dall. 415, 1 L.Ed. 440.

Additionally, as petitioners we are seeking, for ourselves and for the citizenry of New York State, in general, a measure of simple justice, based on the cardinal principle that "justice is justice" – whether it is meted out to one man or to a million, to one person or to a "body" of persons. On the other hand, it should be noted that the existence of ***injustice*** does not have to be recognized by all members of a body afflicted by it, in order for it to "be" injustice. Indeed, it is an historical fact that the fathers of this country and the designers of the great doctrines and principles that have shaped its development, were led by one or two perceptive individuals who recognized the degree to which the injustices of despotism were being visited upon the people, and wrote major documents that exposed them as violations of the natural laws -- the "rights of man" -- that underlie and shape the basic doctrines -- the constitutions and statutes that frame and preserve our system and our society, today.

The pursuit of justice, in fulfillment of the constitutional design-imperatives expressed above (the right to have a State government republican in form and substance, that is subject to the consent of the governed, and the right of the governed to petition their government for a redress of grievances) is the rationale behind this petition, based upon the types of constitutional inconsistencies perpetrated by the State of New York -- injustices that obviously demand the attention of the U.S. Supreme Court.

POINT IX

THE JUDGES IN THE COURT BELOW WERE CONFLICTED

For plaintiffs to have been able to receive equal justice under the law in the highest court in the State, much less to prevail in their assertion of constitutional infirmities in this case, it would first be necessary for Chief Judge Judith Kaye and Judges Bellacosa, Ciparick and Levine (hereinafter the "Judges") to do

something each has failed to do in prior similar cases brought to them at the Court of Appeals by plaintiff Schulz and other citizens -- recognize the unconstitutionality of SFL 123-b(1) because it is violative of the First Amendment's guarantee of every citizen's right to petition the government for a redress of grievances.

Then, with SFL 123-b(1) no longer serving as an impenetrable barrier to judicial review of legislative and executive public borrowing schemes, in order for plaintiffs to have received equal justice in the court to say nothing of prevailing in their assertion of the constitutional infirmities they see regarding Chapter 16 L97, it would then be necessary for the Judges to hazard the value of their personal financial interests and, in the case of Judge Kaye's spouse, the length and content of the list of lucrative state public corporation clients of the law firm of which he is a partner -- Proskauer, Rose, Getz and Mendelsohn.

It was understood that, in order for plaintiffs to prevail in this case, the constitutionality of billions of dollars of outstanding bonds issued by public corporations/political subdivisions of the state would be called into question. This would adversely affect the value of all bonds issued by the state's public authorities and corporations, and compromise the state's ability to redeem those bonds according to their fixed schedules. Plaintiffs are not interested in creating financial chaos irrespective of any opinions to the contrary. They do believe, however, that the fall of the state's "shadow government" approach to raising money is inevitable and that it must be dealt with sooner rather than later if chaos is to be avoided. Prospective relief was an open avenue and the court knew this since it was brought up in Judge Smith's dissenting opinion in the Court's decision in 1993 -- Schulz, et al. v the State of New York, et al., 81 NY2d 336.

Should plaintiffs prevail in this case, the adverse impact on the value of the financial securities owned by the Judges would be substantial. However, if the State's credit rating is kept low by continual use of SFL 123-b(1) as a shield against appropriate Judicial scrutiny of Legislative and Executive borrowing activities, the interest income of bond holders is maintained at a high level.

As reported on their financial disclosure forms, the Judges have forbidden economic interests. These were fully identified by plaintiffs in their Affidavit in Support of their Motion to

Disqualify the judges. The following is taken from that Affidavit.

Judge Kaye's husband has a partnership interest in a law firm that lists among its clients numerous New York bond-issuing authorities, such as the Metropolitan Transit Authority, City of New York, NYC Transit Authority, NYC Housing Authority, NYC School Construction Authority, and several others. She has listed investment that include New York City bonds and government securities and money funds held by Merrill Lynch, Smith Barney, CJ Lawrence, Deutsche Morgan Grenfell, Citibank, and Bessemer -- either in IRA or regular accounts. Her balanced fund, fixed-income fund, and money market fund investments contain hundreds of bonds, which would include New York municipals.

Judge Bellacosa has listed investments that also contain hundreds of bonds, including New York State Urban Development Corporation, NYS Power Authority, Tri-Borough Bridge & Tunnel Authority, Port Authority of NY & NJ, NYC Water Finance Authority, NYS Dormitory Authority, and several others. He has listed Merrill Lynch IRA and Keogh bond accounts and investments in two Merrill Lynch N.Y. municipal bond funds.

Judge Ciparick lists TIAA/CREF Retirement Annuity for her spouse on her disclosure form. Also listed are her Copeland Company N.Y.S. Deferred Compensation Plan and her spouse's City of New York Teachers' Retirement System Tax-Deferred Annuity (TDA). Since N.Y. has for some time been the state most aggressively pumping out municipal bonds and these bonds are particularly high yield due to New York's low credit rating, it is virtually inevitable that these investments would contain N.Y. bonds.

Judge Levine has listed investments including NYS Dormitory Authority and City of New York bonds, and the (Oppenheimer) Rochester Tax Free Fund (regarded by some as the premier New York muni-bond fund, which contains over 800 NY bond issues).

The Judges, except Judge Levine who has recused himself in prior similar cases that came before the Court of Appeals, have, by their action or inaction, conveyed a bias and prejudice in favor of the State parties to the actions and of their own personal financial interests and against plaintiffs, while so conflicted.

CONCLUSION

For these reasons a Writ of Certiorari should be issued to review the opinion and order of the New York State Court of Appeals.

DATED: March 18, 1999

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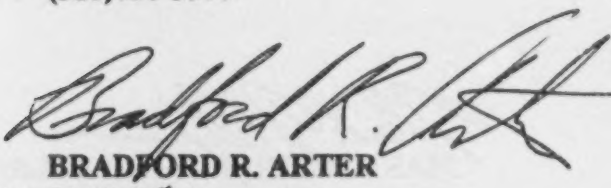

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CONCLUSION

For these reasons a Writ of Certiorari should be issued to review the opinion and order of the New York State Court of Appeals.

DATED: March 18, 1999

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Appendix A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany On the twenty-second day Of December 1998.

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding.

3-10

Mo. No. 1306

Robert L. Schulz, et al.,
Appellants,

v.

The New York State Legislature,
Et al.,
Respondents,

The City of New York et al.,
Intervenors-Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

Appendix B

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany On the twenty-second day Of September 1998.

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding.

Mo. No. 1075

Robert L. Schulz, et al.,

Appellants,

v.

The New York State Legislature, Et al.,

Respondents,

The City of New York et al.,

Intervenors-Respondents.

The appellants having filed a notice of appeal and a motion to disqualify Judge Kaye and Judges Bellacosa, Levine and Ciparick in the above title and due consideration having been thereupon had, it is

ORDERED, that the said motion to disqualify Chief Judge Kaye and Judges Bellacosa, Levine and Ciparick be and the same hereby is dismissed upon the ground that the Court has no authority to entertain the motion made on nonstatutory grounds. The application seeking recusal is referred to the Judges for individual consideration and determination by each Judge (see, Matter of Sims v State Commn. On Judicial Conduct, 62 NY2d 884; New York Criminal and Civil Courts Bar Assn. V State of New York, 46 NY2d 730; Matter of Waltemade, 37 NY2d [11]).

Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick and Wesley concur.

Chief Judge Kaye and Judges Bellacosa, Levine and Ciparick each respectively denies the referred motion for disqualification.

And it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. All concur.

Stuart M. Cohen
Clerk of the Court

Appendix C

Supreme Court – Appellate Division
Third Judicial Department

Decided and Entered: July 30, 1998 81812

ROBERT L. SCHULZ et al.,

Appellants,

v

OPINION AND ORDER

NEW YORK STATE LEGISLATURE et al., Bing 97-002770-A2

Respondents.

Calendar Date: June 2, 1998

Before: Mikoll, J.P.., Mercure, Crew III, White and Yesawich Jr., JJ.

Robert L. Schulz, Queensbury, for appellants.

Dennis C. Vacco, Attorney-General (Andrew D. Bing of counsel), Albany, for the New York Legislature and others, respondents.

Hawkins, Delafield & Wood (W. Cullen MacDonald of counsel), New York City, for New York City Transitional Finance Authority, respondent.

Michael D. Hess, Corporation Counsel (Ellen Ravitch of counsel), New York City, for City of New York, respondent.

Crew III, J.

Appeal (transferred to this court by order of the Court of Appeals) from an order of the Supreme Court (Teresi, J.), entered November 25, 1997 in Albany County, which granted defendants' motions for summary judgment.

Pursuant to the Laws 1997 (ch 16), defendant State Legislature amended Public Authorities Law article 8 and added a new title 33 entitled the New York City Transitional Finance Authority Act (hereinafter the Act) (see, Public Authorities Law § 2799-aa). The Act provides for the creation of the New York City Transitional Finance Authority (hereinafter the Authority), a public benefit corporation, which, under certain specified conditions, is authorized to issue bonds to fund capital improvement projects in New York City (see, Public Authorities Law §§ 2799-cc, 2799-gg).

Briefly, upon a declaration of need by the Mayor of New York City, the Mayor is to request that the Authority provide financing in accordance with the provisions of Public Authorities Law title 33 (see, Public Authorities Law § 2799-ff [4]). Once the Authority determines, based upon the submissions tendered by the Mayor, that a capital financing need exists, the Authority is empowered to enter into agreements with the City to finance the relevant improvement project (see, Public Authorities Law § 2799-ff [5], [6]). To that end, the Act expressly provides that "[s]uch agreements shall not constitute indebtedness of the city for purposes of section 20.00 of the local finance law or any constitutional or statutory limitation" (Public Authorities Law § 2799-ff [5] [a]), nor shall the Authority's revenues be deemed funds of the City (see, Public Authorities Law § 2799-ff [5] [b]).

The Authority is authorized to issue bonds, notes or other obligations to pay for the cost of such improvement projects, with the aggregate principal amount not to exceed $7.5 billion (see, Public Authorities Law § 2799-gg [1]). In this regard, Public Authorities Law § 2799-gg [10] provides, in relevant part, as follows:

> The bonds or other obligations of the authority shall not be a debt of either the state or the city, and neither the state nor the city shall be liable

> thereon, nor shall they be payable out of any funds other than those of the authority; and such bonds shall contain on the face thereof a statement to such effect.

Funds or resources of the Authority may be derived from a variety of sources (see, Public Authorities Law § 2799-hh [1]) including, insofar as is relevant to this appeal, payments made to the Authority by defendant Comptroller, which, in turn, stem from two sources – the personal income tax imposed upon City residents and collected by the Comptroller pursuant to Tax Law § 1313 and "alternative revenues", defined by Public Authorities Law § 2799-bb [1] as sales and compensating use taxes that the City is authorized to impose pursuant to Tax Law § § 1107 and 1210. A review of Public Authorities Law §§ 2799-hh and 2799-ii reveals that the primary resource for the Authority will be the aforementioned personal income taxes, with the Comptroller to make a payment from alternative revenues only in the event that the City income tax revenues are projected to be insufficient to meet a specified level of debt service on the bonds. Public Authorities Law § 2799-ii further provides that nothing contained therein "shall be deemed to restrict the right of the state to amend, modify, repeal or otherwise alter statutes imposing or relating to the taxes payable to the authority pursuant to [Tax Law § 1313]", nor "to obligate the state to make any additional payments or impose any taxes to satisfy the debt service obligations of the authority".

Plaintiffs Robert L. Schulz and Gary T. Loughrey commenced this declaratory judgment action against the Legislature, the Speaker of the Assembly, the Senate Majority Leader and the Governor (hereinafter collectively referred to as the State defendants) seeking a declaration that the Act and State Finance Law § 123-b(1) are unconstitutional. Following the filing of the State defendants' answer and initial motion to dismiss and for summary judgment, an amended complaint was filed adding Mark N. Axinn, Bradford R. Arter and James B. Strawhorn as plaintiffs and the Comptroller as a defendant. An answer was submitted on behalf of the State defendants (now including the Comptroller) and the prior motion seeking dismissal and/or summary judgment was renewed. Thereafter,

Supreme Court converted the State defendants' motion to dismiss into a motion for summary judgment and permitted defendants City of New York and the Authority (hereinafter collectively referred to as the City defendants) to intervene; the City defendants then cross-moved for summary judgment as well.

Plaintiffs' various applications for injunctive relief proved unsuccessful and, ultimately, Supreme Court granted defendants' respective motions for summary judgment. In so doing, Supreme Court concluded that, with the exception of Schulz and Loughrey, plaintiffs had standing to pursue this action. On the merits, Supreme Court declared the Act to be constitutional but declined to address plaintiffs' challenge to the constitutionality of State Finance Law § 123-b(1), finding that such claim previously had been resolved against plaintiffs. Plaintiffs thereafter attempted a direct appeal to the Court of Appeals and, following transfer to this court, plaintiffs' motion for a preliminary injunction pending appeal was denied.

We affirm. As to the issue of standing, Supreme Court appears to have granted Axinn, Arter and Strawhorn, all of whom are City residents, "taxpayer" standing pursuant to General Municipal Law § 51 and "voter" standing based upon their allegation that the Act violates the public referendum requirement of NY Constitution, article VII, § 11. Although defendants do not appear to dispute, and we have no quarrel with the proposition, that plaintiffs indeed possess standing as voters to assert that the Act violates the public referendum requirement of NY Constitution, article VII, § 11 (see, e.g., Matter of Schulz v New York State Executive, 233 AD2d 43, 48, affd ___ NY2d ___ [June 9, 1998] [finding that the Court of Appeals' decision in Matter of Schulz v State of New York (81 NY2d 336) evidenced "an intent to permit voter standing in an action or proceeding predicated upon an alleged violation of any of the fundamental requirements of NY Constitution, article VII, § 11"]), we disagree with Supreme Court that such standing should be limited to only those plaintiffs who are City residents. While it is true that plaintiffs allege that the Act is nothing more than an elaborate attempt to evade the constitutional limitations on debt incursion imposed upon the City by NY Constitution, article VIII, § 4, plaintiffs' overall challenge to the Act is much broader

in scope. Thus, to the extent that plaintiffs contend that the financing scheme imposed by the Act runs afoul of NY Constitution, article VII, § 11 and deprives them of a State-wide public referendum in this regard, each plaintiff here should be afforded voter standing on that basis.[1] The remaining arguments advanced by plaintiffs on this point, including their assertion that they have citizen-taxpayer standing pursuant to State Finance Law § 123-b(1), have been examined and found to be lacking in merit.[2]

Turning to the merits, plaintiffs' remaining constitutional claims, to the extent that they are properly before this court, [3] are premised upon the erroneous belief that any debt

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[1] Such standing does not, however, extend to plaintiffs' claims that the Act violates NY Constitution, article VII, § 8 (gift or loan of State money or credit), NY Constitution, article VIII, § 12 (limits upon local indebtedness) or NY Constitution, article X, § 5 (restriction on assumption of obligations of a public corporation), as such provisions are not linked to any voting rights (see, e.g., Matter of Schulz v State of New York, 193 AD2d 171, 177, affd 84 NY2d 231, cert denied 513 AD2d 1127).

[2] As for Supreme Court's finding that certain plaintiffs are entitled to standing pursuant to General Municipal Law § 51, we note that plaintiffs do not appear to have asserted standing under this provision and, in our view, the record as a whole does not support such a claim (see generally, Mesivta of Forest Hills Inst. V City of New York, 58 NY2d 1014, 1016 [requiring allegation of fraudulent acts or the use of public property or funds for an entirely illegal purpose]). With respect to plaintiffs' attempt to assert standing pursuant to State Finance Law § 123-b(1), it is clear that regardless of the manner in which plaintiffs' claims are styled, they essentially are challenging the validity of the Authority's issuance of bonds to fund capital improvement projects identified in New York City. The plain language of State Finance Law § 123-b(1) precludes standing under such circumstances, and the constitutionality of such provision has long since been resolved (see, e.g., Schulz v State of New York, 185 AD2d 596, 597, appeal dismissed 81 NY2d 336).

[3] For example, we note that although plaintiffs argue on appeal that the Act violates NY Constitution, article VII, § 7 (providing, in relevant part, that "[n]o money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law"), this issue was not raised in

incurred by the Authority pursuant to the Act is a debt of the State and the City. The basis for this belief, in turn, is plaintiffs' assertion that the State and City are obligated, through the payments made to the Authority by the Comptroller, to fund the debt service on the bonds issued by the Authority. Plaintiffs' argument on this point, however, ignores not only the plain language of Public Authorities Law § 2799-gg (10) and Public Authorities Law § 2799-ii,[4] but also the Court of Appeals' prior decisions in Wein v City of New York (36 NY2d 610) and Schulz v State of New York (84 NY2d 231, cert denied 513 US 1127), which, in our view, are entirely dispositive of this matter. A review of the funding mechanisms at issue in Wein and Schulz, each of which contained language virtually identical to that set forth in Public Authorities Law § 2799-gg (10), plainly reveals that the payments made by the Comptroller here are "permissible gifts" to the Authority (see, Wein v City of New York, supra, at 618-619).

Simply stated, plaintiffs have failed to meet their heavy burden of demonstrating beyond a reasonable doubt (see, Matter of Klein [Hartnett], 78 NY2d 662, 666, cert denied 504 US 912) that, pursuant to the Act, the State and City are legally obligated to the holders of the bonds in the event of the Authority's default and, thus, have incurred debt in contravention of the relevant

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plaintiffs' complaint or amended complaint and, hence, is not properly before us (see, Matter of Pure Air & Water of Chemung County v Davidson, __ AD2d __, __, 668 NYS2d 248, 249, appeal dismissed 91 NY2d 955).

[4] As noted previously, Public Authorities Law § 2799-gg (10) provides that:

> The bonds or other obligations of the authority shall not be a debt of either the state or the city, and neither the state nor the city shall be liable thereon, nor shall they be payable out of any funds other than those of the authority; and such bonds shall contain on the face thereof a statement to such effect.

Similarly, Public Authorities Law § 2799-ii, which discusses the payments made to the Authority by the Comptroller, provides, in relevant part, that "[n]othing in this section shall be deemed to obligate the state to make any additional payments or impose any taxes to satisfy the debt service obligations of the authority".

constitutional mandates. Plaintiffs' remaining contentions have been examined and found to be lacking in merit.

Mikoll, J.P., Mercure, White and Yesawich Jr., JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Michael J. Novack
Clerk of the Court

Appendix D

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

ROBERT L. SCHULZ, GARY T. LOUGHREY, MARK N. AXINN, BRADFORD R. ARTER, and JAMES B. STRAWHORN,

PLAINTIFFS,

- against -

INDEX NO. 3256-97
DECISION AND ORDER
RJI NO. 0197049871

THE NEW YORK STATE LEGISLATURE; SHELDON SILVER, SPEAKER OF THE ASSEMBLY and JOSEPH BRUNO, SENATE MAJORITY LEADER; and THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR; and H. CARL MCCALL, COMPTROLLER.

DEFENDANTS,

- and -

THE CITY OF NEW YORK and THE CITY TRANSITIONAL FINANCE AUTHORITY,

INTERVENOR DEFENDANTS,

Supreme Court Albany County, Special Term, October 7, 1997
Assigned to Justice Joseph C. Teresi

APPEARANCES: Schulz, Loughrey, Axinn, Arter, Strawhorn
Pro se Plaintiffs
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TERESI, J.:

This is a motion pursuant to C.P.L.R. § 3212 for Summary Judgement. Plaintiffs are Robert L. Schulz, Gary T. Loughrey, Mark N. Axinn, Bradford R. Arter, and James B. Strawhorn. Defendants are the New York State Legislature, Sheldon Silver as Speaker of the Assembly, Joseph Bruno as the Senate Majority Leader, the New York State Executive Governor Pataki, and Carl H. McCall as State Comptroller. Intervening Defendants are the City of New York and the New York City Transitional Finance Authority. Defendants and Intervening Defendants are collectively hereinafter referred to as 'Defendants'.

Plaintiffs initiated this action on June 2, 1997, against Defendants requesting Declaratory Judgement pursuant to C.P.L.R. § 3001 for an action arising under Article 7A of the State Finance Law. Plaintiffs request a declaration that Chapter 16 of the laws of 1997 is unconstitutional, null and void; a declaration that the language of S.F.L. § 123-b[1] is unconstitutional, null and void; and an injunction preliminarily and temporarily enjoining the Transitional Finance Authority from issuing bonds. Defendants oppose any such determinations

and moved to dismiss on the bases that Plaintiffs failed to name and obtain jurisdiction over necessary parties pursuant to C.P.L.R. § 3211 (a)(3), failed to state a cause of action pursuant to C.P.L.R. § 3211 (a)(7), and the doctrines of res judicata and stare decis. On June 26, 1997, the City of New York and the Transitional Finance Authority moved to intervene as party Defendants, either as of right pursuant to C.P.L.R. § 1012, or by Court permission pursuant to C.P.L.R. § 1013, and filed Notice of a Motion to Dismiss or in the alternative for Summary Judgement.

On September 5, 1997, Plaintiffs' request for a preliminary injunction was summarily denied, Interveners were granted joinder as party Defendants, and Defendants Motion to Dismiss was converted to a Summary Judgement Motion pursuant to C.P.L.R. § 3211 (c). Plaintiffs subsequently filed several TRO applications which were denied.

Findings of the Court

STANDING

The question of whether a person seeking judicial relief is a proper party, is an issue of justiciability which must be considered at the outset of litigation. Matter of Dairylea Coop v. Walkley, 38 N.Y.2d 6,9 (1976). That an issue may be of public concern, does not automatically entitle a party to standing. Courts provide a forum for airing issues of vital public concern, however public hearings and the election processes also provide for such. Society of Plastics Industry v. County of Suffolk, 77 N.Y.2d 761, 763 (1991). Nevertheless, a litigant able to establish standing is permitted to seek judicial review. Id.

Principles of standing have developed from common law and throughout Federal and State judicial precedent. Limitations are essential to the principles of standing. For example, Courts have defined the general prohibition against one raising the legal rights of another, banned adjudication of generalized grievances more appropriately addressed by the representative branches of government, and required that the interest or injury claimed by the party falls within the "zone of interest" protected by the statute invoked. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-

476 (1982). The "zone of interest", tying the injury in fact asserted to the government act challenged, has been defined as encompassing the group of persons who may challenge the action. Association of Data Processing Service Organization v. Corp., 397 U.S. 150, 153 (1973). The existence of an injury in fact, requires an actual legal stake in the outcome of the matter sought to be adjudicated, and ensures that the party seeking review has some real tangible interest in prosecuting the action. Schlessinger v. Residents to Stop the War, 418 U.S. 208, 220-221 (1976), Lujan v. National Wildlife Federation, 497 U.S. 871, 882-883, 110 S.Ct. 3186 (1990).

In New York State, the threshold inquiry for determining standing, is whether the person asserting standing claims a specific injury in fact, different from injury to the public in general; whether that person is asserting a generalized grievance, more approporiately addressed by the Legislature; or whether the part asserts an injury within the "zone of interest" protected by the statute which the litigant seeks to invoke. Society of Plastics Industry v. County of Suffolk, 77 N.Y.2d 761, 764 (1991), Matter of Mobil Oil Corp. v. Syracuse Industrial Development Agency, 76 N.Y.2d 428, 433 (1980).

General Municipal Law § 51 allows prosecution of government officers for illegal acts. G.M.L. § 51 (Consol. 1997). A person can obtain standing to sue government officials either by alleging some generalized wrong, which is considered a taxpayer suit pursuant to this section, or by alleging personal and direct harm from the improper government action. Clearview Gardens Fourth Corp. v. Michael, 110 Misc.2d 1022 (1981). Personal or direct harm must be peculiar to a person's individual interests so as to distinguish their harm from the rights of the general population. Id. Personal harm is not alleged in the Petition, therefore this Court will only address the issue of taxpayer standing under G.M.L. § 51 as it affects State Finance Law § 123-b[1].

General Municipal Law § 51 gives taxpayers the right to sue public officials to prevent waste or injury, and a taxpayer has a punitive right of action based solely on the illegal official action, and taxpayers need not demonstrate an individual interest other than that of the taxpayer's presumed direct and immediate interest in challenging the expenditure of municipal funds. Wein v. City of New York, 80 Misc.2d 894, 365 N.Y.S.2d 955,

affirmed 47 A.D.2d 367, 366 S.2d 885, modified on other grounds 36 N.Y.2d 610, 33 N.E.2d 514. In Korn v. Gulotta, a taxpayer met his burden of demonstrating the public injury necessary to entitle him to maintain an action under G.M.L. § 51, by claiming that County monies, available to reduce property taxes, were not lawfully appropriated in the County Budget. Korn v. Gulotta, 72 N.Y.2d 363, 367 (1989).

However, Courts have continuously held that individuals do not have standing as citizen taxpayers under S.F.L. § 123-b[1], to challenge financing plans which involve the issuance of bonds. Wein v. Comptroller of New York State, 46 N.Y.2d 394 (1979). Article 7-A of the State Finance Law includes a provision which states that any citizen taxpayer:

> "whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief or both, against an office or employee of the State who in the course of his or her duties has caused, is now causing or is about to cause a wrongful expenditure, misappropriation, or any other illegal or unconstitutional disbursement of state funds or state property, except that this provision shall not apply to the authorization, sale, execution or delivery of a bond issued or a note issued in anticipation thereof by the State or any agency, instrumentality, or subdivision thereof or by any public corporation or public benefit corporation." State Finance Law § 123-b[1].

As a result, in order to qualify for taxpayer standing under S.F.L. § 123-b[1], Plaintiffs must show that the expenditures which they seek to challenge, are actual expenditures of State funds. Schulz v. State of New York, 217 A.D.2d 393 (3rd Dept. 1995). The only funds which Chapter 16 of the Laws of 1997 authorize to be paid to the TFA are New York City income taxes incurred under § 1313 of the State Tax Law, and certain municipal sales and compensatory use taxes authorized by Public Authorities Law § 2799-ii, for the Municipal Assistance Corporation for the City of New York. Public Authorities Law § § 2799, et seq. (Consol. 1997).

Therefore, Plaintiffs do not have standing under S.F.L. § 123-b[1]. Schulz, 217 A.D.2d 393 (3rd Dept. 1995).

Citizen taxpayers do have standing to challenge enactments of the State Legislature as contrary to mandates of the State Constitution. Boryszewski v. Bridges, 37 N.Y.2d 361 (1976). Taxpayers have standing to challenge on constitutional grounds, State Legislature enactments authorizing the expenditure of State funds where the failure to accord standing would effectively prevent judicial scrutiny of legislative action. Id. Further the doctrine of Separation of Powers is integral, and individual taxpayers are cnouraged to take an active interest in government because they are the most likely to invoke the powers of the judiciary, and as such they should not be excluded from access to the Courts. Boryszewski, supra. While Courts in New York have not generally recognized taxpayer standing with respect to bond issues, where the bond issue affects other interests of the litigant, the Courts have recognized standing under the right to vote guaranteed by Article VII, § 11 of the N.Y. Constitution. Matter of Schulz v. State of New York, 81 N.Y.2d 336 (1993).

The general constitutional limitation on the exercise of the right to vote on appropriations are contained in Article VII, § 11 of the State Constitution. Known as the "people's resolution," Article VII, § 11 was enacted to protect the State from the uncertain and possibly disastrous consequences which could result from allowing laws creating debt to take effect without a referendum vote. 2 Lincoln, op. Cit. At 73-83. In People ex rel Hopkins v. Board of Supervisors, the Court ruled that it was legally impossible for the Legislature to contract debt in the absence of approval by the people through referendum; and that such approval is a condition precedent to the creation of debt. People ex rel Hopkins v. Board of Supervisors, 52 N.Y. at 556. The limitations on taxpayer standing, to the extent urged by Defendants here, would confer upon the Legislature the opportunity to permanently avoid submitting long-term debt financing plans to voters. Wein v. Comptroller of the State of New York, 46 N.Y.2d 394 (1979), New York State Coalition for Criminal Justice, Inc. v. Coughlin, 64 N.Y.2d 660 (1985). The bar to taxpayer standing to challenge the issuance of bonds or bond anticipation notes under S.F.L § 123-b[1] acts as a bar to standing in such cases, it should not be followed, with respect to

financing strategies subject to voter referendum approval. Schulz v. State of New York, 81 N.Y.2d 363, 347 (1993), People ex rel Hopkins v. Board of Supervisors, 52 N.Y. at 556.

In 1993, the Court of Appeals ruled that where a statutory exception is an expression of legislative policy making it inappropriate to confer standing, it is clear that standing exists under principles of common law. Schulz v. State of New York, 81 N.Y.2d 363, 348 (1993).

> "The time has now come when the judicially formulated restriction on standing should be modified to bring our State's practices with respect to review of Legislative action, into conformity not only with the practices of the majority of other states, but also with the procedural standing of taxpayers to challenge local actions. (G.M.L. § 51). We are now prepared to recognize standing where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action. In the present instance it must be considered unlikely that the officials of State government who would otherwise be the only ones having standing to seek review, would vigorously attack legislation under which each is or may be a personal beneficiary." Schulz v State of New York, 81 N.Y.2d 336 (1993), quoting Boryszewski v. Bridges, 37 N.Y.2d at 364.

In Schulz, Judge Bellacosa reasoned that history and the check and balance principles of government recognize the People as the source of government power, and that serious concerns accompany "a complete cloak of immunity" that precludes public access to judicial review of financing schemes. Schulz, at 342.

The only tax revenues which Chapter 16 of the Laws of 1997 authorize to be paid to the TFA are New York City income taxes and municipal sales and compensatory use taxes. N.Y. Tax Law § 1313, P.A.L. § 2799-ii. Since Plaintiffs Schulz and Loughrey own real property assessed in Warren and Washington Counties respectively, they have no personal interest as taxpayers arising under G.M.L. § 51, or voter standing with

respect to taxes assessed and collected in New York City. Schulz, *discussed infra*. Whereas this Court is reluctant to overrule judicial precedent granting standing where the Legislature and Courts have ruled none exists, this Court cannot recognize voter taxpayer standing for Plaintiffs Schulz and Loughrey.

However, Plaintiffs Axinn, Strawhorn, and Arter are taxpayers and residents of the City of New York, this Court recognizes their standing as voter taxpayers and will grant judicial review of the financing programs set out in Chapter 16 of the Laws of 1997.

CHAPTER 16 OF THE LAWS OF 1997

Article VII, section 7 of the New York State Constitution states in part:

> "no money shall ever be paid out of the State Treasury or any of its' funds, or any of the funds under its management; except in the presence of an appropriation by law..." Article VII, § 7 N.Y. Const.

Plaintiffs allege that Defendants, in enacting Chapter 16 of the Laws of 1997, have authorized money derived from state and local income and sales taxes, under the care and management of the State Comptroller, to be paid to the Transitional Finance Authority without submitting said proposal to the required and proper appropriations by law, in violation of Article VII, § 7 of the New York State Constitution. Plaintiffs however, did not raise this argument in their Petition or their amended Petition.

In Saratoga Harness Racing Association v. Agriculture & New York State Horse Breeding Development Fund, the Court ruled that a public finance fund was legal because it was the instrument through which the Legislature chose to effectuate a legitimate public interest. Saratoga Harness Racing Association v. Agriculture and New York State Horse Breeding Development Fund, 22 N.Y.2d 119 (1969). That Court decided whether or not a fund not directly held or managed by the State, but held or managed by a public corporation, came within the purview of the Constitution by examining the purposes sought to

be attained by creation of the fund. Id at 123. Reviewing the history of Article 7, § 7, the Court expressed concern that absent Legislative control over expenditures, it was possible for the State to incur obligations in excess of its actual limit and thus create financial burdens for future generations. Id at 124. However, they ruled that not every fund comprised of revenues from public taxation falls within the purview of limitations set out in § 7 of Article VII of the New York State Constitution because "striking down said Legislation will hamper and cripple a significant Legislative program, and such a result is not mandated by the language, purpose or spirit of § 7, Article 7 of the N.Y. Constitution. Id, quoting Matter of Clark v. Sheldon, 106 N.Y. 104, People v. ex rel Evans and Chapin, 101 N.Y. 682.

The purpose of § 7 of Article VII is to ensure that the Legislature retains control over State income and expenditures, not to prohibit Public Benefit Corporations from making expenditures. Saratoga Harness Racing Association v. Agriculture & New York State Horse Breeding Fund, 22 N.Y.2d 119 (1969). Plaintiffs argument that voter rejection of proposed statutory amendments in 1995 voided the Legislatures pre-existing authority under the Constitution to create public service corporations and to provide for their funding, is merit less. The rejection of said amendments to Article VII, (*Concurrent Resolution of the Senate and the Assembly 3631-A, §§ 2, 3, 4, 10, 11*), did not abrogate the already existing provisions of the N.Y. Constitution. Rejection of an amendment does not amend the Constitution either. Public benefit corporations were devised by the Legislature to separate the administrative and fiscal responsibilities of the State, in order to insulate the State from liability while enabling public projects to continue. General Contractors v. Thruway, 88 N.Y.2d 56, 75 (1997). Thus, the language of Article 7, § 7 does not prevent the Legislature from creating public service corporations which issue bonds.

Plaintiffs argue that the Defendants, in enacting Chapter 16 of the Laws of 1997, have suspended Article X, § 5 of the N.Y. Constitution, and have created a law obnoxious to the State Constitution. Plaintiffs further argue that Chapter 16 of the Laws of 1997 violates Article 4, § 4, Article VII, §§ 8, 11, and Article VII, §§ 1, 2, 12 of the N.Y. Constitution, in that State funds are unlawfully appropriated to finance the TFA, and the issuance of bonds by the TFA will result in future debt

obligations which are debt of the State and the City of New York which will be in excess of the Constitutional limitations on debt for the City of New York.

Defendants contend that Chapter 16 of the Laws of 1997 is constitutional, because the Legislature declared the debt limitations set out in Article 4, § 4 outdated and adopted Chapter 16 of the Laws of 1997 to provide for new funding mechanism which would ensure adequate funding for the necessary modifications of New York City's infrastructure. The new funding process takes the form of a Public Benefit Corporation called the Transitional Finance Authority, hereinafter referred to as the TFA or the Authority. It is set out in Chapter 16 of the Laws of 1997.

The N.Y. Constitution reads in relevant parts:

> "...neither the state, nor any political subdivision thereof shall at any time be liable for the payment of any obligation issued by such a public corporation heretofore or hereafter created, nor may the Legislature accept, authorize acceptance of, or impose such liability upon the state or any political subdivision thereof...."
>
> Article X, §5, N.Y. Constitution

> "...nor shall credit of the state be given or loaned to, or aid of any individual, or public or private corporation or association, or private undertaking...."
>
> Article VII, § 8, N.Y. Constitution

> "...nor shall any county, city, town or village, or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking..."
>
> Article VIII, § 1, N.Y. Constitution

> "...no county, city, town, village, or school district described in this section shall be allowed to contract indebtedness for any purpose or in any manner which, including existing indebtedness, shall exceed an amount equal to the following percentages of the average full valuation of taxable real estate of such county, city, town, village or school district...."

Article IV, § 4, N.Y. Constitution

"...no indebtedness shall be contracted by any county, city, town, village or school district unless such county, city, town, village or school district he pledged its faith and credit for the payment of the principle thereof, and the interest thereon...this provision shall be made annually by appropriation by every county, city, town, village, or school district for the payment of interest on all indebtedness and for the amounts required for amortization and redemption of term bonds, sinking funds and serial bonds..."

Article VIII, § 2 N.Y. Constitution

"...it shall be the duty of the Legislature, subject to the provisions of this constitution, to restrict the power of taxation, assessment, borrowing money, contracting indebtedness and loaning of credit by county, city, town, village or school districts as to prevent abuses in taxation and assessments, and in the contracting of indebtedness."

Article VIII, § 12, N.Y. Constitution

"...no debt shall be hereinafter contracted by or in behalf of the State, unless such debt shall be authorized by law, for some single work or purpose therein. No such law shall take effect until it shall at the general election, have been submitted to the people, and have received a majority of votes cast for it at the election."

Article VII, § 11, N.Y. Constitution

Chapter 16 of the Laws of 1997 expressly provides for the TFA to issue bonds pursuant to Public Authorities Law, Title 33. Funding for the bonds is obtained through the collection of income taxes pursuant to the newly amended § 1313 of the Tax Law. N.Y. Tax Law § 1313. The bonds are not debt of the State of New York or New York City, and read so on their face. Public Authorities Law § 2799-gg.

Joseph J. Lhota, Director of the New York City Office of Management & Budget, submitted an affidavit dated June 23, 1997, in support of Defendants position that Chapter 16 of the Laws of 1997 is constitutional. The affidavit attests that absent

the financing capacity provided for under the Act, the capital improvements and commitments necessary under the City's current renovation plan, would exceed the general debt-limit by approximately $3.068 billion dollars through the end of the 1998 fiscal year, and approximately $7.110 billion dollars, on a cumulative basis, by the end of the 1999 fiscal year. Lhota explains that the TFA is necessary to permit the City to continue capital work which is required for the continued functioning and viability of the City's infrastructure. He maintains that the planned capital program encompasses over 5,000 different projects (renovation and repair of elementary and secondary school buildings; maintenance of bridges, roads, garbage removal, police, and fire stations), each vital to the City's residents and the economic vitality of the region.

As set forth by the Plaintiffs, Article 4, § 4 (c) of the N.Y. Constitution establishes a limit on the contractual indebtedness allowed for New York City, for the purposes of restricting debt to 10% of the average of the full valuation of taxable real estate in New York City. Article 4, § 4(c) N.Y. Constitution. Plaintiffs further advance that the creation of the TFA and issuance of the bonds will result in New York City incurring indebtedness in excess of their proscribed Constitutional limit.

Defendants assert in response that the TFA will only be able to issue bonds which assume an obligation of no more than 7.5 billion dollars, and that the TFA's funds will be available to pay any indebtedness incurred by the TFA, not the funds of the State or the City of New York. In other words, Defendants assert that any debt created or assumed by the TFA, is not debt of the State or the City of New York, but that of the TFA's alone.

Public Authorities Law, Title 33 states in parts:

> "The bonds or obligations of the Authority shall not be a debt of either the State or the City of New York, and neither the State nor the City shall liable thereon."
>
> P.A.L. § 2799-gg[10]

> "The Authority's revenues shall not be deemed funds of the State or the City of New York."
>
> P.A.L. § 2799-ff(5) (b)

Under P.A.L. § 2799-ii, the only two sources of funds for payment to the Authority from the State Comptroller are (1) payments from § 1313 of the Tax Law account which holds City personal income taxes imposed pursuant to Article 30 of the N.Y.S. Tax Law, and (2) "alternative revenues" which are defined by P.A.L. § 2799-bb (1) as sales and compensatory use taxes collected by the City which were authorized by N.Y.S. Tax Law § 1210, and sales and compensatory use taxes imposed by Tax Law § 1107 for the City's Municipal Assistance Corporation. P.A.L. § 2799-ii. Further, the last line of § 2799-ii expressly provides that:

> "... nothing in this section shall be deemed to obligate the State to make any payments, or to impose any taxes to satisfy the debt service obligations of the Authority."
>
> P.A.L. § 2799-ii

New York City's personal income taxes are not part of the State Treasury. They are collected under § 1313 of the Tax Law. When the Legislature enacted Chapter 16, they contemporaneously amended § 1313 of the Tax Law to provide for direct payment of City personal income taxes to the TFA. The amendment included a provision stating that City personal income tax revenues are not the property of the State of New York. Tax Law § 1313.

Additionally, under § 1313, "alternate revenue" distributions are only to be made by the State Comptroller, if the Mayor indicates to him/her that the payments from City income taxes are insufficient to meet the necessary debt service coverage bonds. N.Y. Tax Law § 1313.

The New York State Commissioner of Taxation and Finance is required to deposit City personal income taxes and the compensatory use and sales taxes in a specific bank account which have been designated for them by the Comptroller, where they are held in trust for the City of New York. New York State Public Interest Research Group Inc. (NYPIRG) v. New York State Thruway Authority, 77 N.Y.2d 86, 92 (1990). These funds are kept separate and distinct from all other sources of revenue controlled by the Comptroller. Id, N.Y. Tax Law § 1261. The N.Y. Constitution expressly provides that the Comptroller may

review the accounts of all public corporations (Article X, § 5), but that power is discretionary and the Comptroller has no duty to supervise public corporations. See NYPIRG at 90-91.

Chapter 16 of the Laws of 1997 does not authorize the State to make payments of State Tax revenue to the Authority. P.A.L. § 2799-ii. Chapter 16 of the Laws of 1997 only authorizes the designation of municipal personal income taxes and compensatory use sales taxes, as sources of income for the Authority. And while the TFA is authorized to receive gifts and appropriations, the State and the City are not obligated to give same. P.A.L. § 2799-hh.

Furthermore, the New York Municipal Assistance Corporation tax is a compensatory sales and use tax which is appropriated annually by the Legislature pursuant to § 92-d(3) of the State Finance Law. S.F.L. § 92-d(3). § 4 of the State Finance Law expressly provides that:

> "...funds not legally or equitably owned by the State, but held in trust or in the custody of a State Agency or officer, pending transfer to the rightful owner, may be transferred to such individuals or organizations by such agency or officer without an appropriation by law."
>
> State Finance Law 4 (4).

Therefore, none of the funds which will be used to finance the TFA are State funds which have been illegally appropriated. Mancuso v. New York State Thruway Authority, 86 F.3d 289, 296 (2nd Cir. 1996).

In Comerski v. City of Elmira, the Court of Appeals held that Public Finance Authorities should be upheld unless they are "patently" illegal. See, 308 N.Y. 248, 254, (1955). The term "patently" illegal requires that Plaintiffs must prove that statute is unconstitutional beyond a reasonable doubt, before that statute will be found illegal. Hope v. Perales, 83 N.Y.2d 563, 574-575, (1995), see also Matter of Klein, 78 N.Y.2d 662, 666, cert denied __ U.S. __, 112 S.Ct. 1945. In Comerski, the Court ruled that the City of Elmira could make a gift of its public funds to a public corporation for proper public purposes under Article VIII, § 1 did not prohibit gifts of money by a city or county to a public corporation for a proper public purpose because the language of the statute only prohibited gifts or loans to individuals or private

groups and giving/ loaning credit to individuals and public or private groups. Id at 252. The Court stated:

> "Statutes saying that municipalities are not liable on an Authority's bonds, and that the bonds are payable out of the Authorities funds...means that the Legislature did not see, nor do we, any inconsistency between two kinds of statutory pronouncements. The provisions mean what they say: the authority's bonds are to be debt of the authority only, payable out of its' funds only...And we shall not strain ourselves to find illegality in such programs....Since the city itself cannot meet the requirements of the situation, the only alternative is for the State, to provide a method of constructing the improvements and financing their costs." Comerski, at 253-254, quoting Roberts v. Zimmerman, 268 N.Y. 52, 62, (1935).

This Court is aware that this is not the first time that the constitutional limitations of New York City's fiscal resources have been addressed by the Legislature, or questioned in court. For example, Title 26 of the Public Authorities Law was examined and found to be constitutional in Wein v. City of New York. Wein v. City of New York, 36 N.Y.2d 610, 618 (1976). In that case, a taxpayer challenged the Legislature's creation of the Stabilization Reserve Corporation (SRC), a public service corporation created to sell bonds for the express purpose of permitting New York City to obtain additional operating revenues, as unconstitutional. Wein, *supr*; , Laws of 1974, Ch. 594. The SRC bond proceeds were available to provide the City with money for its' General Fund. Id at 614. Noting that the SRC was a conduit for funds, the Court of Appeals did not find any constitutional violations because the terms of the enactment expressly provided that the debt obligations were not owed by the City. Id at 619. The court assumed that the legal and constitutional basis for permitting the funneling of a municipality's money to a public benefit corporation by the Legislature, was founded on the similar right of a municipality to make gifts to a public benefit corporation pursuant to Article VII, § 1. Id. Holding, that the moneys received by or due the City, were a gift for all purposes and could be used by the City in

the manner described, which was not under any circumstances, a lien. Wein, at 619.

In Schulz v. State of New York, the Court of Appeals addressed the merits of a challenge to bond authorizations pursuant to Article VIII, § 1, Article VII, § 8, Article X, § 5 and Article VII, § 11. Schulz v. State of New York, 84 N.Y.2d at 247, (1995). In examining public finance authorities, the Court noted that the first such public authority, the Port Authority of New York, was held to be constitutional in 1921. (See Collins v. Manhattan & Bronx Surface Tr. Operating Authority, 62 N.Y.2d 361, 367, (1984). In further analyzing the issue of debt obligation by the State for the Finance Authority, the Schulz Court stated that moral obligations of States to pay back money received, were not legal obligations to do same, and whether or not to recognize the moral obligation, is within the discretion of the State. Schulz at 244, quoting Williamsburg Savings Bank v. State of New York, 243 N.Y. 231, 244-245; see also Schulz at 247, footnote 6. The Court of Appeals ascertained that the relevant statute was tailored clearly to require that the State would not be liable for Authority debt obligations. Schulz at 245. Further, the Schulz Court noted that:

> "...disclosure of debt liability on the face of the bond, when read in light of the Constitutional provision against State assumption of Authority debt (Article X, § 5) seems sufficient to overcome any reasonable expectation on the part of bondholders that the State will guarantee return in the event of default by the Authority." Schulz at 248, quoting Mullue v. McKenzie, 269 N.Y. 369, 376, reargument denied 270 N.Y. 563.

An Authority, for the purpose of contracting its own debt, has legally binding obligations because it is a public corporation existing independently of the State. Mancuso v. New York State Thruway Authority, 86 F.3d 289, 294 (2nd cir. 1996). Thus, no matter how Plaintiffs perceive Chapter 16 of the Laws of 1997, neither the State nor the City has as enforceable obligation to pay the Authority's debt. See also Wein v. City of New York, 36 N.Y.2d 610 (1976).

In enacting Chapter 16 of the Laws of 1997, the Legislature expressly included a clause which explains that the

State or City of New York are not obligated for any of the TFA's debts. P.A.L. § 2799-gg[10]. No where in said statute, is there a requirement that the State or the City of New York give money to the TFA. The income, sales and compensatory use taxes are available to the TFA, but the State and the City are not bound to make payments to the TFA. P.A.L. § 2799-ii. Therefore, the State and the City of New York are neither loaning or giving credit, nor assuming debt obligation by funding the TFA.

As stated by the Court of Appeals, where financial legislation is involved, Courts must give statutes which establish public funding programs, an inference of legality because they were established to address the problems of modern life. Schulz v. State of New York, 84 N.Y.2d 247 (1995), quoting Comerski v. City of Elmira, *discussed infra.* Wherefore this Court, based upon the multitude of precedent and the affidavit of Mr. Lhota, must give Public Authorities Law/ Chapter 16 of the Laws of 1997 an inference of Constitutionality. The fact that the TFA bonds will state on their face thereof, that the City and the State are not liable for any debt obligations, is evidence that the State and the City of New York are not loaning credit and will not be increasing their debt past the proscribed Constitutional limits. This Court gives deference to the Legislature because of the magnitude of the need to address the current funding problems faced by New York City. As noted by Lhota, to enjoin issuance of the bonds will result in grave danger to the health and economic vitality of New York City and its residents. This Court declines to assist the possibility of such an outcome. Therefore, based upon the nature of the claims, the overwhelming public interest in continued funding for capital improvements and repairs in New York City, and the history of precedent permitting public benefit corporations in New York State, this Court finds Chapter 16 of the Laws of 1997 to be constitutional.

INJUNCTIVE RELIEF

Plaintiffs seek a preliminary injunction pursuant to C.P.L.R. Article 63. C.P.L.R. Article 63. In order to obtain an injunction, Plaintiffs must establish (1) that they have a likelihood of ultimate success on the merits, (2) that they will suffer irreparable harm if a preliminary injunction is not granted,

and (3) that a balancing of the equities weighs in favor of their argument. Grant Co. v. Srogi, 52 N.Y.2d 496, 517, (1981), Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 70 A.D.2d 1021, Tucker v. Toia, 54 A.D.2d 332. Inasmuch as this Court has found Chapter 16 of the Laws of 1997 constitutional, analysis of the underlying merits of Plaintiffs' request, and issuance of a preliminary injunction, are moot.

STATE FINANCE LAW § 123-B[1]

Plaintiffs assert in the Petition that the exception to S.F.L. § 123-b violates their State Constitutional Right to "petition government", to assert claims against the assumption of debt and use of government credit; violates Federal Constitutional rights to petition the government, due process rights, and protection against "involuntary economic servitude"; violates the security of the Privileges and Immunities Clause, and denies them the right to have a Republican form of government.

State Finance Law § 123-b[1] states in part:

> "...any person, who is a citizen taxpayer...may maintain an action for equitable or declaratory relief...except that the provisions of this subdivision shall not apply to the authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof, or by any public corporation or public benefit corporation."
>
> S.F.L. § 123-b[1]

The Court of Appeals has held that the exception in subdivision 1, of the State Finance Law § 123-b, does not apply to bond issues. Wein v. Comptroller of the State of New York, 46 N.Y.2d 394, 398 (1972). In so holding, the Court distinguishes the exception from other exceptions, as one that is not "true" because it grants taxpayer standing with respect to State expenditures, but not revenue raising. Id. The Court of Appeals noted that the statute's "exception" was an expression of Legislative policy which made it inappropriate to confer standing on taxpayers where bond issues were involved, but

ruled that standing was provided for under common law. Wein, supra.

Furthermore, no matter how phrased, Plaintiffs are essentially challenging the validity of certain revenue raising programs, and Standing cannot be predicated upon the statutory taxpayer provision of S.F.L. 123-b(1). Schulz v. State of New York, 185 A.D.2d 597 (3rd Dept. 1992). Thus, it has been held that the exception to S.F.L. 123-b only accords a taxpayer standing to challenge State expenditures, and "does not apply to taxpayer suits involving revenue raising through State bond issues and/ or bond anticipation notes. Id. (See also Matter of Schulz v. State of New York, 180 A.D.2d 42, 44, N.Y.S. Commission of Criminal Justice v. Coughlin, 64 N.Y.2d 660, 662, Wein v. New York State Comptroller, 46 N.Y.2d 394, 398-400.) However, the Court of Appeals has ruled that when S.F.L. 123-b[1] bars taxpayer standing, standing under the Article 7, § 11 right to vote may be granted. Schulz, 81 N.Y.2d 336 (1993).

Two main rules comprise the doctrine of res judicata. The first rule is that judgement of an issue on the merits, by a competent Court, is a bar to another suit between the same parties, or their privies, on the same cause of action. 73 N.Y. Jur. 2d, Judgments § 320fn. The other rule is that a point directly in issue and judicially passed on the merits in a judgment of a competent court, cannot again be drawn in any future action between the same parties, or their privies, whether or not the cause of action is identical. Brown v. Lockwood, 76 A.D.2d 721 (2nd Dept. 1980). The doctrine of res judicata does not depend upon any manifested or presumed intention of the parties, only on the desirability and the public" interest in the orderly termination of judicial repose and controversy. American Insurance Co., v. Messinger, 43 N.Y.2d 184 (1977).

Additionally, the doctrine of stare decisis provides that once a Court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision. People v. Bing, 76 N.Y.2d 331 (1990). Precedent is entitled to respect, no matter how wrong it may seem to the viewer, so long as it resulted from a reasoned analysis. People v. Robles, 72 N.Y.2d 689 (1989). In cases interpreting the constitution, the courts will, if convinced of prior error, correct the error by allowing the claim to proceed. People v. Hobson, 39 N.Y.2d 479 (1976). However, where statutory

interpretation is requested, Courts will not normally step in. Higby v. Mahoney, 48 N.Y.2d 15 (1979). The principle which disfavors changing judicial interpretation of a Legislative enactment, is applicable where the specific construction of a statute has been accepted by the courts for a long period of time. In Re Estate of Eckert, 39 N.Y.2d 493 (1976).

The Constitutionality of S.F.L. § 123-b[1] was declared in Schulz v. State of New York. Schulz v. State of New York, 185 A.D.2d 596 (1992). Additionally, on April 14, 1997, a similar challenge to the constitutionality of S.F.L. § 123-b[1] was dismissed by the Chief United States District Court Judge Thomas J. McAvoy. Schulz v. State of New York, et al., 960 F.Supp. 568 (N.D.N.Y. 1997). These decisions invoke the doctrine of res judicata with respect to any challenge that is or could be asserted concerning Defendants issuance of bonds and § 123-b of the State Finance Law. Further, Plaintiffs claims against the constitutionality of S.F.L. § 123-b, are barred by the doctrine of stare decisis. The Court of Appeals has repeatedly addressed and ruled that where § 123-b does not grant taxpayers standing to address bond issues, common law standing may be available. Wein v. Comptroller of New York State, 46 N.Y.2d 394 (1979). And the Court of Appeals has ruled that where no common law standing exists, standing may be available under a taxpayers right to vote. Schulz v. State of New York, 81 N.Y.2d 336 (1993). Therefore this Court declines to address Plaintiffs constitutional claims against S.F.L. § 123-b[1] on the basis of res judicata and stare decisis.

Plaintiffs claim numerous violations of their U.S. Constitutional Rights. On the bases of res judicata and stare decisis, this Court declines to comment on these claims. See Memorandum Decision and Order of J. McAvoy, dated 4/14/97, 960 F.Supp. 568 (N.D.N.Y. 1997). Chapter 16 of the Laws of 1997 is hereby declared a legally permissible Legislative enactment.

WHEREFORE this Court grants Defendants' Motion for Summary Judgment.

All papers, including this Decision and Order, are being returned to the Attorneys for the Defendant State of New York. The signing of this Decision and Order shall not constitute entry or filing under C.P.L.R. 2220. Counsel are not relieved from the

applicable provisions of the section with respect to filing, entry and notice of entry.

SO ORDERED!

Dated: Albany, NY
November 25, 1997

Joseph C. Teresi, J.S.C.

Papers Considered:

(1) Plaintiffs Verified Complaint dated June 2, 1997, and attached Exhibits.
(2) Plaintiffs Amended Verified Complaint dated June 21, 1997, and attached Exhibits.
(3) Defendants Answer dated June 20, 1997.
(4) Defendants Answer to the 1st Amended Complaint dated July 11, 1997.
(5) Defendants Amended Answer dated Sept. 30, 1997.
(6) Defendants Affidavit for a Motion to Dismiss and for Intervention dated June 26, 1997.
(7) Affidavit of Joseph Lhota, dated June 26, 1997.
(8) Affidavit of Plaintiffs dated July 13, 1997.
(9) Affidavit of Plaintiffs dated August 22, 1997 and attached Exhibits.
(10) Supplemental Affidavit of Joseph Lhota dated Sept. 26, 1997, and attached Exhibits.
(11) Affidavit of Plaintiffs dated Sept. 5, 1997, and attached Exhibits.
(12) Affidavit of Plaintiffs dated October 7, 1997, and attached Exhibits.
(13) Plaintiffs Affidavit in Opposition to Defendants Motion for Summary Judgement dated Sept. 30, 1997, and attached Exhibits.
(14) Record dated September 22, 1997.

APPENDIX E

SECTIONS OF CHAPTER 16 OF THE NEW YORK LAWS OF 1997 -- THE NEW YORK CITY TRANSITIONAL FINANCE ACT -- WHICH INDIVIDUALLY AND SEVERALLY MAKE THE ACT UNCONSTITUTIONAL AS VIOLATIVE OF THE VARIOUS DEBT LIMITING RESTRICTIONS OF THE N.Y.S. CONSTITUTION

"the authority may enter into agreements with the city and the city, acting by the mayor alone, may enter into agreements with the authority in accordance with the provisions of this title as to the financing of costs by the authority, the application of tax revenues to the authority to secure its bonds, and further assurances in respect to the authority's receipt of such revenues."

Section 2799-ff.5(b)

"Such agreements (i) shall describe by reference to the capital budget of the city particular projects and costs to be financed in whole or in part by the authority, (ii) shall describe the plan for the financing of the costs or projects, (iii) shall set forth the method by which and by whom and the terms and conditions upon which money provided by the authority shall be disbursed to the city, which disbursements shall occur, subject to receipt by the authority of such documentation as to the costs being reimbursed as the authority shall reasonably require, at least monthly, (iv) shall provide for the payment of such costs by the city under such contracts as shall be awarded by the city or for the city to make a capital contribution of such proceeds as city funds to another entity for the payment or reimbursements of such costs, and (v) shall require every contract entered into by the city, or another entity receiving funds from the city, for projects or costs to be financed in whole or in part by the authority to be subject to the provisions of the New York City Charter and other applicable laws governing contracts of the city or such entity, as the case may be."

Section 2799.ff.6

"The authority shall have the power and is hereby authorized from time to time to issue bonds, in conformity with applicable provisions of the uniform commercial code, in such principal amounts as it may determine to be necessary pursuant to section 2799-ff of this title to pay the cost of any project and to fund reserves to secure such bonds, including incidental expenses in connection therewith. The aggregate principal amount of such bonds, notes or other obligations so issued shall not exceed $7.5 billion, excluding bonds, notes or other obligations issued to refund or otherwise repay bonds, notes or other obligations theretofore issued for such purposes;"

Section 2799-gg.1

"Whenever the authority shall determine that the issuance of its bonds is appropriate, which determination shall occur at a minimum whenever necessary to reimburse the city for project capital costs incurred by the city,..."

Section 2799-gg.5

"Any resolution or resolutions authorizing bonds or any issue of bonds may contain provisions which may be part of the contract with the holders of the bonds thereby authorized as to: (a) pledging all or part of its revenues, together with any other moneys, securities or contracts, to secure the payment of the bonds, subject to such agreements with the bondholders as may then exit...(f) vesting in a trustee or trustees such properties, rights, powers and duties in trust as the authority may determine, which may include any or all of the rights, powers and duties of the trustee appointed by the bondholders pursuant to section 2799-00 of this title...."

Section 2799-gg.6

"In addition to the powers herein conferred upon the authority to secure its bonds, the authority shall have power in connection with the issuance of bonds to enter into such agreements for the benefit of the bondholders as the authority may deem necessary, convenient or desirable concerning the use or disposition of its revenues or other moneys, including the entrusting, pledging or creation of any other security interest in any such revenues, moneys and the doing of any act, including refraining from doing any act, which the authority

would have the right to do in the absence of such agreements. The authority shall have power to enter into amendments of any such agreements within the powers granted to the authority by this title and to perform such agreements. The provisions of any such agreements may be made part of the contract with the holders of the bonds of the authority."

Section 2799-gg.7

"Subject to the provisions of this title, the directors of the authority shall receive, accept, invest, administer, expend and disperse for its corporate purposes all money of the authority from whatever sources derived including (a) payments by the state comptroller pursuant to this title; (b) the proceeds of bonds...."

Section 2799-hh.1

"Tax revenues received by the authority pursuant to Section 1313 of the tax law, together with any alternate revenues received by the authority, shall be applied in the following order of priority; first pursuant to the authority's contract with bondholders, then to pay the authority's operating expenses not otherwise provided for, and then pursuant to the authority's agreements with the city...."

Section 2799-hh.5

"Agreement with the state. The state does hereby pledge and agree with the holders of any issue of bonds and/or bond anticipation notes secured by such a pledge that the state will not limit or alter the rights hereby vested in the authority to fulfill the terms of any agreements made with such holders pursuant to this title, or in any way impair the rights and remedies of such holders or the security for such bonds and/or bond anticipation notes until such bonds and/or bond anticipation notes, together with the interest thereon and all costs and expenses in connection with any action or proceeding by or on behalf of such holders, are fully paid and discharged. Nothing contained in this section shall be deemed to restrict the right of the state to amend, modify, repeal or otherwise alter statutes imposing or relating to the taxes payable to the authority pursuant to section thirteen hundred thirteen of the tax law. Not less than thirty days prior to the beginning of

each city fiscal year, the chairperson of the authority shall certify to the state comptroller, the governor, and the members of the board of directors of the authority a schedule of maximum annual debt service payments due on the bonds and notes of the corporation then outstanding. To the extent that the tax revenues payable to the authority under section thirteen hundred thirteen of the tax law during such fiscal year are projected by the mayor to be insufficient to meet at least one hundred fifty percent of maximum annual debt service on authority bonds then outstanding, the mayor shall so notify the state comptroller and the state comptroller shall pay to the authority from alternative revenues such amount as is necessary to provide at least one hundred fifty percent of the maximum annual debt service; provided, however, that for so long as any indebtedness of the municipal assistance corporation for the city of New York remains outstanding no alternative revenues that are, as of the effective date of this title, or any in the future be, required to be deposited in the municipal assistance tax fund established under section ninety-two-d of the state finance law shall be paid to the authority except out of funds that are otherwise required to be paid to the city under such section of the state finance law. Nothing in this section shall be deemed to obligate the state to make any additional payments or impose any taxes to satisfy the debt service obligations of the authority."

Section 2799-ii

"Agreement with the city. The city is authorized to pledge and agree with the holders of any issue of bonds and/or bond anticipation notes secured by such a pledge that the city will not limit or alter the rights hereby vested in the authority to fulfill the terms of any agreements made with such holders pursuant to this title, or in any way impair the rights and remedies of such holders or the security for such bonds and/or bond anticipation notes until such bonds and/or bond anticipation notes, together with the interest thereon and all costs and expenses in connection with any action or proceeding by or on behalf of such holders, are fully paid and discharged. Nothing contained in this section shall be deemed to restrict any right the city may have to amend, modify or otherwise alter local laws imposing or relating to the taxes payable to the

authority pursuant to section thirteen hundred thirteen of the tax law so long as, after giving effect to such amendment, modification or other alternation, the amount of tax revenues projected by the mayor to be available to the authority during each of its fiscal years following the effective date of such amendment, modification or other alteration shall be not less than one hundred fifty percent of maximum annual debt service on authority bonds then outstanding."

Section 2799-jj

APPENDIX F

2458 Ridge Road
Queensbury, NY 12804
(518) 6556-3578

August 10, 1998

Hon. Stuart M. Cohen
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207-1095

Re: Schulz v NYS Legislature, et al.
Index No. 3256-97 A.D. No. 81812

Dear Mr. Cohen:

This is in response to the Court's sua sponte letter dated July 31, 1998.

Plaintiffs' substantial constitutional questions, which were raised in the court of original instance and which are directly involved, are as follows:

Question No. 1
Whether SFL 123-b(1) Is Unconstitutional

Plaintiffs have early and expressly challenged the exception in SFL 123-b(1) on its face, as violative of plaintiffs' fundamental, constitutional right to petition their government for a redress of grievances as expressly provided by Article I, Section 9.1 of the New York Constitution (See R 45, para. 36) and as expressly provided by the First Amendment of the United States Constitution (See R 46, para. 37).

In addition, plaintiffs have early and expressly challenged the exception in SFL 123-b(1) as unconstitutional in its application because it was being used by the Legislature, Executive and Judiciary to bar citizens from seeking the protections and guarantees provided by the New York Constitution (See R 45, 46) and under Article IV and the 5th and 14th Amendments to the

U.S. Constitution (See R 46,47), ***if the matter involves public borrowing***.

In a manifest act of injustice, the court below dismissed most of plaintiffs' claims in the instant case for lack of standing under SFL 123-b(1), after arbitrarily and capriciously ruling that plaintiffs' constitutional challenge to SFL 123-b(1) was barred by the doctrines of res judicata and stare decises. There has been no court decision which responded to, fully encompassed and was decisive of the question. Instead, there is a daisy chain of decisions which, by reference, appear to rely on Wein v Comptroller, 46 NY2d 394 (1979), a case in which the question of the constitutionality of SFL 123-b(1) was neither presented, raised nor determined. In support of its ruling in the instant case, the court below cited Wein v Comptroller, 46 NY2d 394 (1979) and other cases that in turn cited Wein v Comptroller: Schulz v State of New York, 185 AD2d 596 aff'd 81 NY2d 336 (1993); Schulz v State of New York, 193 AD2d 171, 177, aff'd 84 NY2d 231, cert denial 513 US 1127; and Schulz v N.Y.S. Executive, 233 AD2d 43, aff'd __ NY2d __ [June 9, 1998].

Again, the question of the constitutionality of SFL 123-b(1) was not presented, raised or determined in Wein v Comptroller, 46 NY2d 394 (1979). It never came up! The continuing dismissal of this claim on the basis of res judicata and stare decisis and the continual (20 year) case-to-case practice of applying SFL 123-b(1) to dismiss causes of action involving public borrowing is one of the greatest calamities in the history of the N.Y.S. court system. It is obvious, prima facie, that the courts' practice has reflected its cooperation with the general government's desire for the funds involved in the bond issues, irrespective of their source. In affect, the courts have enforced an act of the legislative and executive branches which countermands constitutional guarantees. That is, it closes the courts' doors to citizens who need to assert their constitutional rights and who need to seek the protection of certain constitutional provisions.

While the Wein court denied standing to Professor Wein, citing SFL 123-b(1), the Wein court was not asked to consider the constitutionality of such a door closing statute

-- a statute written to prevent citizens from asserting their constitutional rights in any forum -- and so, to its discredit, it chose to turn a blind eye toward the written Constitutions of New York State and the United States. The NYS court system has used SFL 123-b(1) as a convenient crutch to frustrate legitimate taxpayer questions about the propriety of bond issues, ostensibly to "minimize the uncertainty in the minds of potential investors in New York bonds."

It cannot be fairly argued that the decisions in Schulz v State of New York, 185 Ad2d 596, or in Schulz v State of New York, 193 AD2d 171 responded to, fully encompassed and were decisive of the question of the constitutionality of SFL 123-b(1) which was properly before the courts in both cases. In dismissing the constitutional attacks on SFL 123-b(1) the Third Department merely cited Wein v Comptroller, 46 NY2d 394 (1979) which, as argued in the preceding paragraph, was a case in which the question of the constitutionality of SFL 123-b(1) was never raised, presented or determined. Nor can it be fairly argued that the Court of Appeals in Schulz v State of New York, 81 NY2d 336 (1993) or in Schulz v State of New York, 84 NY2d 231 (1994), responded to and fully encompassed the question of the constitutionality of SFL 123-b(1), which was properly before that Court in both cases. Unlike Wein v Comptroller, the question of the constitutionality of SFL 123-b(1) was properly before the Court of Appeals but the Court simply did not address the question.

Nor can it be fairly argued that the courts' decisions in Schulz v N.Y.S. Executive, 233 AD2d 43, __ NY2d __ [June 9, 1998] responded to, fully encompassed and was decisive of the question of the constitutionality of SFL 123-b(1). In dismissing the constitutional attack on SFL 123-b(1) the Third Department merely cited its decision in Schulz v State of New York, 185 AD2d 596 (1992) which, as argued above, merely cited Wein v Comptroller, 46 NY2d 394 which, as argued above, was a case in which the question of the constitutionality of SFL 123-b(1) was never raised, presented or determined.

The Court of Appeals again failed to address the question of the constitutionality of SFL 123-b(1) before dismissing plaintiffs' Article III claim for lack of standing, citing SFL 123-b(1).

Finally, in Schulz v State of New York, 960 F.Supp. 568 (N.D.N.Y. 1997) the federal court did not respond at all to the question of the constitutionality of SFL 123-b(1), much less fully encompass the question in its deliberations and decision. As argued on pages 16-19 of their Reply Brief to the Federal Court of Appeals for the Second Circuit (copy attached as Exhibit A hereto), the District Court simply failed to address plaintiffs' First Amendment "right to petition" claim against SFL 123-b(1) and applied the wrong "privileges and immunity" clause to the claim against SFL 123-b(1). Exhibit A hereto, along with Judge McAvoy's decision itself (Exhibit B), demonstrates that the question of the constitutionality of SFL 123-b(1), while properly before that Court, was not addressed much less determined in Schulz v State of New York, 960 F.Supp. 568 (N.D.N.Y. 1997).

SFL 123-b(1) cannot be used to deny plaintiffs' their fundamental right to assert their constitutional claims. To do so violates plaintiffs' right to petition the government for a redress of (constitutional) grievances. Plaintiffs have a fundamental right to seek the protection of, and to defend in court, each and every provision of the New York Constitution against transgression/abuse by government officials ***whether or not the matter involves public borrowing.*** Plaintiffs have the fundamental right to maintain an action challenging the constitutionality of Chapter 16 L97 in defense of the New York Constitution Article VII Section 7, Article VII Section 8, Article VIII Section 1, Article VIII Section 2, Article VIII Section 4, Article VIII Section 12 and Article X Section 5, as well as Article VIII Section 11, as they have done in this case. The legislative and executive branches cannot legally make a law that abridges plaintiffs' privileges and immunities. Nor can the Judiciary legally enforce one.

Plaintiffs' constitutional right, as citizens of this state, to defend each and every provision of the Constitution is not limited by their status as voters.

No State constitutional protection can be effectively nullified by an Act of the State Legislature, unless the Constitution enables it. No legislative Act can legally direct the Judiciary to close the door to any citizen seeking the protection of a provision of the Constitution from an Act of the Legislature which is in conflict with it, whether or not the matter involves public borrowing.

Under our system of governance the people are to enjoy the republican principles of popular sovereignty, self-government, a government which derives its powers from the consent of the governed as expressed in their Constitution, and separation of powers.

Chapter 16 L97 violate these principles. Plaintiffs are injured (loss of sovereignty, erosion of liberty, annual payment of tax revenues without legislative appropriation, increased State and local indebtedness above constitutional limits and without pledging full faith and credit, use of public funds to pay debt obligations of a public corporation, etc.), and SFL 123-b(1) cannot be used to prevent citizens from seeking redress. These injuries lie within the zone-of-interest to be protected by the Constitution in general and specifically by said sections of Articles VII, VIII and X.

Plaintiffs have constitutional standing. Their standing rises to a constitutional right on matters constitutional.

State defendants have admitted (Defendants' Memorandum of Law dated July 11, 1997, page 17, Exhibit A to Appellants' Brief), that plaintiffs have a right to challenge the validity of state legislation as violating plaintiffs' interests that fall within the zone-of-interests to be protected by the Constitution. Defendants have admitted, "[W]here a bond issue affects other interests of the litigant, for example, the right to vote arising under Section 11 of the Article VII of the New York Constitution, the courts have recognized standing (see e.g., Matter of Schulz v State of New York, 81 NY2d 336." Other interests of the plaintiffs-litigants in the instant case have, indeed, been invaded. Plaintiffs have standing because we are claiming injuries to plaintiffs' interests that fall within the zones-of-interests to be protected by:

1. Article VIII, Section 4	(limits NYC debt)
2. Article VIII, Section 2	(requires City to pledge its full faith and credit when incurring debt)
3. Article VIII, Section 12	(requires legislature to prevent abuses in taxation and borrowing)
4. Article X, Section 5	(prohibits the use of public funds to pay the debt of any public corporation)
5. Article VII, Section 7	(requires appropriation by law before any money can be paid out of funds under the care and management of the State Comptroller)
1. Article VII, Section 11	(requires voter approval before the State can contract indebtedness)
2. Article VII, Section 8	(prohibits the State from giving its credit to a public corporation)
3. Article VIII, Section 1	(prohibits the City from giving its credit to a public corporation)

These constitutional questions are substantial and directly involved. The Court is respectfully requested to discontinue the daisy chain of decisions regarding the constitutionality of SFL 123-b(1) by not dismissing this appeal from the lower court's decision regarding this claim on the grounds of res judicata or stare decisis.

Question No. 2

Whether Chapter 16 Of The Laws Of 1997 Is Violative Of Article VII, Section 7 Of The NY Constitution

In another manifested act of injustice, the Third Department dismissed plaintiffs' Article VII, Section 7 claim because the claim was raised in the court of original instance, fully briefed by both plaintiffs and defendants in the court of original instance, reached and dismissed on its merits by the judge of the court of original instance and fully briefed by both plaintiffs and defendants before the Third Department, but not originally presented in the Complaint.

The Third Department was arbitrary and capricious in dismissing plaintiffs' Article VII, Section 7 claim. The issue was briefed by both sides in this controversy ***and Justice Teresi dismissed the claim on the merits.*** It was wrong for the Third Department to dismiss the claim merely because it was not presented in the original Complaint.

As plaintiffs argued before the Third Department (Appellants' Br. page 14), Chapter 16 gave no specific clue that payments by the Comptroller to the TFA would be made without prior appropriation by law. No reasonable person could conclude from reading only the Act that the defendants intended that the money would be paid to the TFA without a prior appropriation. It was not until plaintiffs read the Bond Buyer on September 4, 1997, that they learned that the bonds were being rated and sold as "***appropriation free***" bonds. Plaintiffs then immediately raised the Article VII, Section 7 question in the court of original instance. See plaintiffs' affidavit of September 5, 1997, together with Exhibit A attached thereto (R 138-141). The question was briefed by both sides in the court of original instance. See plaintiffs' affidavit dated 9/17/97 (R 173-176) together with its Exhibit H (R 182-201). See also Exhibit C annexed hereto (also annexed to plaintiffs' Reply Brief . It is a copy of defendants' letter-memorandum to Supreme Court dated October 7, 1997, in support of their motion for summary judgment.

Chapter 16 L97 authorizes the State Comptroller to make payments to the TFA out of funds under his care and management. See definition of "tax revenues" and "alternative revenues" under Section 2799-bb.1 and 15 (R 61). See also Sections 2799-ff.5,6; 2799-gg.6,7; 2799-hh.1,5; 2799-ii and 2799-jj. (R 63-69).

Defendants had argued and Justice Teresi had ruled that the moneys in question are not State funds that come within the provisions of Section 7 of Article VII. This is a fallacy.
Defendants argued that while the Act does, indeed, direct the State Comptroller to make the required payments to the TFA without legislative appropriations the Act does not violate Article VII, Section 7 of the State Constitution which prohibits the Comptroller from paying money "out of the State treasury or any of its (the State's) funds, or any of the funds under its (the State's) management except in pursuance of an appropriation by law." Defendants argued that the Act does not violate this constitutional prohibition because the money the Comptroller is to pay to the TFA is not State money or money in any fund under his care and management. Defendants argued that the structure and process being employed here is similar to the structure and process employed in Saratoga Harness Racing Assn. v Agriculture and N.Y.S. Horse Breeding Development Fund, 22 NY2d 119 (1968) which was determined to be constitutional.

However, this case is distinguishable from Saratoga. In Saratoga, the Horse Breeding Development Fund derived its revenues from private parties (Racing Associations) who were required to pay fees (not general tax revenues) directly to it (the Development Fund). The TFA, on the other hand, derives its revenues from general taxpayers who are required to pay the money to the ***State*** Department of Taxation and Finance, who deposits the money in ***State*** accounts under the care and management of the ***State*** Comptroller -- the principal ***State*** fiscal officer whose office is created by the terms and provisions of the New York Constitution itself -- which ***State*** Comptroller is to draw checks on those accounts made payable to the TFA.

Unlike the TFA, the money in the Horse Breeding Development Fund is not derived from state income and sales taxes and it is

not directly held or managed by the State but is money paid directly to that public benefit corporation, much the same way tolls are paid to the Thruway Authority. Notwithstanding the strong opinion of three dissenting judges (Judge Breitel voted to reverse the lower Court in an opinion in which Chief Judge Fuld and Judge Jasen concurred) the majority opined that the money in question was held in a "fund, not directly held or managed by the State but by a public benefit corporation." Saratoga at 123, 124.

In the case at bar, it cannot fairly be argued that the money in question is to be held in a fund not directly held or managed by the State. In fact, the revenues are to be derived from the most basic and widespread tax programs -- the "income tax" and the "sales and compensating use" tax. In fact, those revenues are to be paid to the State Agency to which all taxes are paid -- the N.Y.S. Department of Taxation and Finance. In fact, the Department deposits those revenues in accounts under the care and management of the State's chief fiscal officer -- the State Comptroller.

No money shall ever be paid "out of the State treasury or any of its (the State's) funds, or any of the funds under its (the State's) management" except upon legislative appropriation. See Matter of Roosevelt Raceway v Monaghan, 9 NY2d 293, 313; Switzer v Commissioners for Loaning Certain Moneys, 134 A.D. 487, 490; 1917 Opns. Atty-Gen. 175, 181-186.

Control by the Legislature through regular appropriation, restrictions on the Legislature to make current appropriations only on a two-year basis at the outside, the public visibility of legislative control over the raising of revenues and their disbursement and the executive – legislative balancing of the budget are objectives of the highest importance in State government. Saratoga at 130, n2.

Defendants in the instant case admitted there are only three sources of payment by the State Comptroller into the Authority (which payment the defendants admit is to be used, first, to service the Authority's debt) and that payment will be made by the State Comptroller from three fund accounts under the care

and management of the State: (1) the Section 1313 Tax Law Account holding revenues from New York City's personal income tax imposed under Article 30 of the NYS Tax Law; (2) the State sales and compensating use tax fund account; and (3) the sales and compensating use tax ***surcharge*** account authorized by Section 1107 of the State Tax Law.

Chapter 16 L97 directs the State Comptroller to make said payments, year after year, as long as the TFA bonds are outstanding (30 years or more***), without requiring the State legislature to appropriate the funds by law***. (Lhota affidavit sworn to on September 2, 1997, paragraph 4). (R 133)

This feature of Chapter 16 is repugnant to Article VII, Section 7 of the New York Constitution and "is unique in New York State, if not in the country." Bond Buyer, September 4, 1997. See (R 146).

The money in the funds established by Sections 1101-1148 and 1313 of the Tax Law are in fact and in law funds under the management of the State within the meaning of Section 7 of Article VII. The funds are, indeed, an integral part of the State and by law under the care and management of the State Comptroller. The funds are used as a source of public expenditure.

Since Chapter 16 L97 envisions disbursement of these funds without appropriation, it represents an unlawful attempt to evade the constitutional controls upon State finances.

This is a substantial constitutional questions that is directly involved. The Court is respectfully requested not to dismiss the appeal from the lower court's decision regarding this question on any ground that the question is not directly involved because it was not properly before the lower court. It was.

Question No. 3

Whether Chapter 16 Of The Laws Of 1997 Is Violative Of Article X, Section 5 Of The N.Y. Constitution

In another terrible act of injustice, the Third Department, relying basically on SFL 123-b(1) and Wein v Comptroller and its prodigy, ruled that plaintiffs lacked standing to seek the protections of Article X, Section 5 simply because this case involves the incurrence of public debt.

As argued under Question 1 above, SFL 123-b(1) is unconstitutional, is abrogated, and should not be used to dismiss a citizen's constitutional attack on Chapter 16 L97.

Chapter 16 L97 is patently illegal -- unconstitutional beyond a reasonable doubt. Plaintiffs' Article X, Section 5 question is substantial and is directly involved, not having been determined in any prior case. No settled law is contrary to the position urged by Appellants.

There can be no question but that under Chapter 16, state and local tax funds will be used to pay obligations of a public corporation in violation of Article X, Section 5. See Table 1 attached hereto.

Question No. 4 and No. 5

Whether Chapter 16 L97 Is Violative Of Article VII, Section 8 And Article VIII, Section 1 of the N.Y. Constitution

In another manifested act of injustice, the Third Department, again relying basically on SFL 123-b(1) and Wein v Comptroller and its prodigy, ruled that plaintiffs lacked standing to seek the protection of Article VII, Section 8 and Article VIII, Section 1 simply because this case involves the incurrence of public debt. As argued under Question No. 1 above, SFL 123-b(1) is unconstitutional, is abrogated, and should not be used to dismiss a citizen's constitutional attack on Chapter 16 L97.

Chapter 16 L97 is patently illegal -- unconstitutional beyond a reasonable doubt. Plaintiffs' Article VII, Section 8 and Article VIII, Section 1 questions are substantial and are directly involved, not having been determined in any prior case.

There can be no question and defendants admit that under Chapter 16 the Legislature has pledged both City and State tax revenues for the expressed, priority purpose of servicing the TFA's debt, in violation of Article VIII, Section 1 and Article VII, Section 8, respectively. See Table 1 attached hereto. Without said authorization the bonds of the TFA would not be creditworthy. Nobody would buy them.

Question No. 6

Whether Chapter 16 L97 Is Violative Of Article VIII, Sections 4, 2 and 12 Of The New York Constitution

In another manifested act of injustice, the Third Department, again relying on SFL 123-b(1) and Wein v Comptroller and its prodigy, ruled that plaintiffs lack standing to seek the protection of Articles VIII, Sections 4, 2, 8 and 12 because this case involves the incurrence of public debt. As argued under Question No. 1 above, SFL 123-b(1) is unconstitutional, is abrogated, and should not be used to dismiss a citizen's constitutional attack on Chapter 16 L97.

Chapter 16 L97 is patently illegal -- unconstitutional beyond a reasonable doubt. Plaintiffs' Article VIII, Sections 4, 2 and 12 questions are substantial and are directly involved, not having been determined in the prior case.

There can be no question, and defendants admit that under Chapter 16, City income and sales tax revenue is earmarked/pledged to be paid to the TFA, putting the City in debt to the TFA in the amount of $7.5 billion plus interest, placing the City's debt well above the constitutional debt limit, in violation of Article VIII, Sections 2, 4 and 12. See Table 1 attached hereto. This issue was not raised or determined in Wein I, a case in which Professor Wein asked the court to determine if the debt of the public corporation (SRC) was the debt of the City in violation of Article VIII, Section 4. The court said no because the City was not obligated to pay the SRC and any payment by the City to the SRC was a "gift". Here, the City is indebted to

the TFA. To avoid the semantic shell game, plaintiffs' question is not whether the debt of the TFA is technically the debt of the City. The question is whether in violation of Article VIII the City is indebted to the TFA and whether that indebtedness exceeds the limit set by Section 4, and whether the City was required to pledge its full faith and credit because of that indebtedness.

Question No. 7

Whether Chapter 16 L97 Is Violative Of Article VII, Section 11 of the N.Y. Constitution

The Third Department acknowledged plaintiffs' standing to seek the voter referendum protection of Article VII, Section 11. However, relying on Wein v City of New York, 36 NY2d 610 (1975) ("Wein I") and Schulz v State of New York, 84 NY2d 231 (1994) ("Schulz I"), defendants argued, and the Third Department erroneously agreed that the provisions of the Chapter 16 conform to a "line of precedents upon which reliance has been placed in the financial marketplace," and that "the Court of Appeals has consistently upheld public authority funding mechanisms which are indistinguishable from that contained in Chapter 16."

Plaintiffs argued under Point IV of their Appellants' Brief (page 19-24) that the facts and the law surrounding the issues which were raised, presented and determined in Wein I are clearly distinguishable from the facts and the law of the case before the bar. Plaintiffs have also argued under Point VIII of their Appellants' Brief (page 28-31) that the facts and the law surrounding the issues which were raised, presented and determined in Schulz I are clearly distinguishable from the facts and the law of the instant case.

Table 1 (attached) demonstrates some of the major unconstitutional provisions of Chapter 16 L97 and demonstrates that this case is distinguishable from Wein I and Schulz I. The Court's attention is directed to Table 1.

Chapter 16 L97 is patently illegal -- unconstitutional beyond a reasonable doubt. Plaintiffs' Article VII, Section 11 question is substantial and is directly involved, not having been determined in the prior case.

Under Chapter 16, State tax revenues are earmarked/pledged to be paid to the TFA, putting the State in debt to the TFA (as opposed to the bondholders) for as long as TFA bonds are outstanding, in violation of the voter referendum requirement of Article VII, Section 11. This issue of the State's indebtedness to a public corporation rather than to the corporation's bondholders is an issue most certainly not raised or determined in Wein I of in Schulz I. Also, in Schulz I, the Court held that the bonds of the MTA and the Thruway Authority were not State debt because the payment was subject to appropriation and not legally enforceable. In the instant case, ***the State's payment is not subject to appropriation and is legally enforceable*** (see Appellants' Brief, pages 29-31). See also Section 2799-00.2, 2799-mm (R 70,71), as well as Article VII, Section 16 of the NY Constitution.

Question No. 8

SFL 123-b(1) And Chapter 16 L97 Are Violative Of Section 1, Clause 2 Of The Fourteenth Amendment To The U.S. Constitution

The purpose of the Fourteenth Amendment, Section 1, Clause 2 is to preserve and enforce, as against state action, those rights, privileges and immunities secured by the constitution. Golden v Biscayne Bay Yacht Club, C.A. Fla. 1976, 530 F.2d 16, certiorari denied 97 S. Ct. 186.

The adoption of section 1, clause 2 of the Fourteenth Amendment implied that there are matters of fundamental justice that the citizens consider so essentially an ingredient of human rights as to require restraint on action on behalf of any state that appears to ignore them. Orleans Parish School Bd. v Bush, C.A. La. 1957, 242 F.2d 156, Certiorari denied 77 S.Ct. 1380.

Section 1, Clause 2 of the Fourteenth Amendment is designed to protect plaintiffs from invasion of their rights, privileges and immunities by the federal ***and state*** governments respectively. Schatte v Int'l Alliance of Theatrical Stage Emp. et. al., D.C. Cal 1947 70 F. Supp. 1008, affirmed 165 F.2d 216 Certiorari denied 68 S.Ct. 1018.

In the constitution and laws of the United States the word "citizen" is generally, if not always used in a political sense to designate one who has the rights and privileges of a citizen of the State or of the United States and it is so used in Section 1, Clause 2 of the Fourteenth Amendment. Baldwin v Franks, Cal 1887, 7 S.Ct. 656. Plaintiffs are citizens of the United States and of New York State.
Section 1, Clause 2 of the Fourteenth Amendment prohibits New York State from denying or abridging privileges or rights of plaintiffs as citizens of the United States. State v Johnston, 1969, 456 P.2d 805, 51 Haw. 195, 259, appeal dismissed 90 S.Ct. 1152. Defendants have violated the Fourteenth Amendment by adopting Chapter 16 L97 and SFL 123-b(1).

The right to sue and defend in the courts is the alternative of force, and it is one of the highest and most essential privileges of citizenship. Chambers v Baltimore etc. R. Co. Ohio 1907, 28 S. St. 34. SFL 123-b(1) strips plaintiffs of that privilege and is, therefore, unconstitutional.

Section 1, Clause 2 of the Fourteenth Amendment furnishes an additional guarantee against any encroachment by the state upon fundamental rights which belong to every citizen as a member of society. U.S. v. Cruikshank, La. 1876, 92 U.S. 554. Chapter 16 L97 and SFL 123-b(1) are such an encroachment.

The Fourteenth amendment's provision that no state shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or [money] property without due [constitutional] process of law are limitations on the power of the States. Peoples Cab Co. v Bloom, D.C. PA 1971, 330 F. Supp. 1235, affirmed 472 F.2d 163. Defendants acted outside of their power in making and enforcing Chapter 16 L97 and SFL 123-b(1).

Amendments 1 to 8 to the U.S. Constitution were intended as restrictions upon the federal government, but Section 1, Clause 2 of the Fourteenth Amendment constitutes a limitation upon the States. Beauregard v Wingard, D.C. Cal. 1964, 230 F. Supp. 167.

The right to petition the government for a redress of grievances and the other rights enumerated in the U.S. Constitution are the privileges and immunities of citizens of the United States; they are secured by the Constitution. U.S. v Hall, C.C. Ala. 1871, 3 Chicago Leg.N.260, 26 Fed.Cas. No.15, 282. Chapter 16 L97 and SFL 123-b(1) are unconstitutional.

Protection of life, liberty, and property rests primarily with the states, and Section 1, Clause 2 of the Fourteenth Amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the State Governments were created to secure. The privileges and immunities of the citizens of the United States are indeed protected by it. In re Kemmler, ____ N.Y. ' 00, 10 S.Ct. 930. Chapter 16 L97 and SFL 123-b(1) are abrogated.

Question No. 9

Chapter 16 L97 And SFL 123-B(1) Are Violative Of Article IV, Section 4 Of The U.S. Constitution

The purpose of Section 4 of Article IV, which guarantees to every state a republican form of government, is to protect the people against aristocratic and monarchical innovations, and to prevent the States from abolishing a republican form of government, in which the government governs based only upon the consent of the governed, whose will is expressed (for instance) in the New York Constitution. Van Sickle v Sharrahan, 1973, 511 P.2d 223, 212 Kan. 426.

The term "state" in section 4 of article IV is used in the idea of a people or political community as distinguished from a government, and is used in its geographical sense. Texas v White, Tex. 1869, 74 U.S. 700.

By the constitution, a republican form of government is guaranteed to every state in the Union and the distinguishing feature of that form is the right of people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative powers reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; ***but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions.*** In re Duncan, Tex. 1891. 11 S. Ct. 573.

The debt-limiting provisions of Articles VII, VIII, and X of the New York Constitution represent the will of the people, not established for light and transient causes but based on the hard lessons of history. The intent of the people is to tightly control the natural tendency of public officials to incur debt.

Section 4 of Article IV guarantees to every state in the Union a republican form of government, and every sentence and provision of the New York Constitution evidences principles of that form of government (including Articles VII, VIII, and X) declaring and guaranteeing liberties of the people. Harris v Shanahan, 1963. 387 P2d 771, 192 Kan.183.

A Final Point

The City alleged (R 133) (Lhota Aff., par 5), that unless the TFA issued some of its bonds right away, the City's ability to enter the capital contracts and to continue its capital program would be "called into question," whatever that meant. The City did not allege that it would not be able to enter into contracts or continue its "capital" program.

The City argued "if" the City were required to shut down its capital program, the impact would be disastrous (R 133) (Lhota Aff., par 6). This was a conclusionary statement, unsupported by the Record. The City did not claim that it would have to shut down its capital program if the Act is declared illegal.

The City alleged (R 133) (Lhota Aff. Par. 7) that "An inability to undertake necessary capital reconstruction of the City's aging

bridges, roads, schools and other public buildings would severely jeopardize the health and safety of the City's inhabitants."

There is no evidence in the Record that but for Chapter 16, the City would not be able to undertake necessary capital reconstruction. Neither the City nor the State offered any evidence that they were flat broke, that they were not already receiving far more tax revenues than they required, which "surplus" funds were available, or that funds could not be transferred from one account to another, or that new taxes could not be imposed. In fact, the City and the State has each received billions of dollars in revenues in 1996 and 1997, over and above their budgetary estimates. The state budgets for 1997-1998 and for 1998-1999 have included surplus fund accounts with hundreds of millions of dollars which are to be spent in any way that the Governor and the two leaders of the Legislature decide to spend that money. The State and the City are routinely providing hundreds of millions of dollars worth of tax credits and subsidies to private corporations, and the City is considering paying the cost of constructing two sports stadiums on behalf of billion dollar team owners and multi-million dollar ball players.

Conclusion

The Court has jurisdiction to hear this appeal. The constitutional questions are substantial and directly involved.

Very truly yours,

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No. 98-1532

In The

Supreme Court of The United States

October Term, 1998

ROBERT L. SCHULZ, GARY T. LOUGHREY, MARK N. AXINN, BRADFORD R. ARTER, and JAMES B. STRAWHORN,

Petitioners,

THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY AND JOSEPH BRUNO, SENATE MAJORITY LEADER; and THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR, H. CARL MC CALL, COMPTROLLER,

Respondents,

And

THE CITY OF NEW YORK; and THE NEW YORK CITY TRANSITIONAL FINANCE AUTHORITY,

Intervenors-Respondents.

SUPPLEMENTAL BRIEF

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99-54

"To take a single step beyond the boundaries specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition" These words of Thomas Jefferson apply equally to the Legislature of the State of New York.

This Court re-affirmed this most fundamental principle in In re Duncan, Tex. 1891, 11 S. Ct. 573, 577, when it held, "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; ***but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions....***" (Plaintiffs' emphasis).

If freedom in America was meant to mean anything, it was meant to mean freedom from the unrestrained acts of government. Governmental power in New York State is now not susceptible of any definition. As reflected by the Acts challenged in the instant case, and other Acts (including the Acts which were the subject of three cert petitions brought to this Court by plaintiff Schulz and others during the past four and one-half years), the State government is paying no heed to the boundaries established by the New York Constitution.[1]

The threat of tyranny and despotism is rising exponentially in New York. New York has become a willfully wayward state. Plaintiffs are paying a very heavy price, not only in terms of their loss of liberty and the erosion of sovereignty but in economic terms as well.

Plaintiffs are part of a group of citizens who recognize the seriousness of the problem of a state that sees itself in possession of a boundless field of power.

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[1] 94-996, 98-81 and 98-421.

This overt governmental lawlessness cannot be allowed to continue. The people deserve better at the hands of their government. All legal remedies have been exhausted at the state level. It is possible for the public patience also to become exhausted and despair to set in. The consequences of this would be unfathomable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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